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REPORTS

OF

CASES

DETERMINED IN THE

Court of Chancery

OF THE

STATE OF NEW-JERSEY.

BY HENRY W. GREEN,

REPORTER.

VOL. II.

CONTAINING THE CASES FROM

January, 1834, to October, 1836, inclusive.

ELIZABETH-TOWN:

PRINTED BY EDWARD SANDERSON.

1846.

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THIS volume contains the decisions of Chancellor VROOM, from his return to office in October, eighteen hundred and thirty-three, until the close of his official labors. The cases precede in point of time those contained in the first volume. No opinions delivered during the period between the close of SAXTON'S Reports and the re-appointment of Chancellor VROOM, have been furnished to the Reporter.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

JANUARY TERM, 1834.

PETER D. VROOM, ESQ. CHANCELLOR.

The MORRIS CANAL AND BANKING COMPANY v. GAMALIEL BARTLETT, DANIEL AYRES and HENRY MCFARLAND.

When a motion is to be made to dissolve an injunction for want of equity in the bill, a general notice is sufficient. But when the party seeks to set aside an injunction as having been informally or improperly issued, either because the facts are not sworn to, or not sworn to before competent authority, or because the money has not been brought into court, or for any special matter not touching the equity of the case, the notice should set out the grounds of the motion.

The statute (*Rev. Laws*, 704, sec. 6) which directs that an injunction shall not issue to stay proceedings in a personal action after a verdict or a judgment, on the application of the defendant at law, unless the amount of the verdict or judgment be first paid into court, applies as well to an interpleading bill, where an injunction is prayed, as to other cases.

BILL of interpleader, and for an injunction, filed 13th October, 1833. The bill states, that on the 28th day of May, 1833, Gamaliel Bartlett, of the city of New-York, recovered a judgment in the supreme court of New-Jersey, against the complainants in this cause, for sixteen hundred and fourteen dollars and fifty-two cents, debt and costs, and caused a writ of fieri facias to

be issued thereon to the sheriff of the county of Sussex, against the real and personal estate of the complainants, returnable to November term, 1833. That Henry McFarland and Daniel Ayres, in or about the month of June, 1833, sued out of the inferior court of common pleas of the county of Bergen, a writ of attachment against the estate of the said Gamaliel Bartlett, as a non-resident debtor; by virtue whereof, the sheriff of the county of Bergen attached the aforesaid judgment, and the money due thereon, in the hands of the complainants. That the said Gamaliel Bartlett is proceeding upon his execution against the complainants for the amount of the judgment recovered against them, and that the said Henry McFarland and Daniel Ayres are proceeding upon their attachment, and threaten that if the complainants pay the amount of the said judgment to the said Gamaliel Bartlett, they will compel the complainants to pay the same over to them, or to the auditors in attachment. That the amount of the said judgment and execution is claimed of the complainants by the sheriff of the county of Sussex, and also by the plaintiffs in attachment. That the complainants know not which of the said claimants is entitled to the money due on the said judgment; that they are ready and willing to pay the said sum of money to either of the said parties to whom it may of right belong, and they offer to bring the same, with the sheriff's fees of execution, into court, for the benefit of such of the parties as may be entitled thereto. The prayer of the bill is, that the parties may interplead, and that they may be restrained from proceeding at law against the complainants, in respect of the premises. The cause was heard upon motion to dissolve the injunction before answer.

J. W. Miller and *S. Scudder*, for defendants, in support of the motion.

E. Vanarsdale, contra.

Cases cited by defendants' counsel. *Rev. Laws*, 495; *Newl. Prac.* 218; *Rev. Laws*, 407; 2 *Paige*, 394, 541; *Newl. Prac.*

212: 3 *Bro. C. C.* 36; 1 *Mad. Ch. Prac.* 174; *Cooper's Rep.* 56; 2 *Vesey*, 301; 2 *Ves. and B.* 407.

Cases cited by complainants' counsel. 2 *Cond. Ch. Rep.* 194; *Eden on Inj.* 335; *Equity Draftsman*, 205; 3 *Cond. Ch. Rep.* 596, 603; 4 *Ibid*, 95; 1 *Mad. Ch. Prac.* 173; 2 *Ves. and B.* 411; 2 *Vesey*, 107; 15 *Vesey*, 244.

THE CHANCELLOR. The complainants set out, that in the month of May, 1833, the defendant, Bartlett, recovered a judgment against them in the supreme court of New-Jersey, for sixteen hundred and fourteen dollars and fifty-two cents, and caused an execution to be issued thereon, and thereby levied on all their personal and real estate in the county of Sussex. That in June, 1833, Ayres and McFarland, creditors of Bartlett, issued out of the common pleas of Bergen, a writ of attachment against the goods and chattels, rights and credits, moneys and effects, of said Bartlett, for four thousand five hundred dollars; by which writ the sheriff of Bergen attached, in the hands of the complainants, the said judgment and sum of money so named as aforesaid.

The complainants state, that by reason of the opposing claims, they are unable to ascertain with certainty to which of the said parties they should pay the money; that they are ready to pay it to either; and pray that the defendants may be ordered to interplead, and that an injunction may issue. To this bill was subjoined the usual affidavit to an interpleading bill, but the facts stated in the bill are not sworn to be true.

It was moved that the injunction be dissolved: 1st, Because the facts charged were not properly verified; 2d, Because the money had not been paid into court before the injunction issued; 3d, Because there was no equity in the bill, or in the understanding of the court that the plaintiffs had not made a propor case for an interpleader.

I am unwilling to set aside the injunction on the first ground. The statute requires that no injunction shall be granted to stay

any proceedings at law, unless the chancellor be satisfied of the complainant's equity, either by affidavit certified at the foot or on the back of the bill that the allegations thereof are true, or by other means. The affidavit contemplated by the statute is wanting, but the chancellor who granted the injunction may have been satisfied of the truth of the allegations by other means. Copies of the records set out in the bill may have been exhibited to him, or such other matter may have been laid before him as to leave no doubt on his mind. And although it may be said that these documents or other matters should be produced here in answer to the motion and to sustain the injunction; yet as no notice has been given that such ground would be taken, I cannot undertake to say that the chancellor erred in this matter. If the defendants intended to take this ground, they should have stated it in the notice. When a motion is to be made to dissolve an injunction for want of equity in the bill, a general notice is sufficient; but when the party seeks to set aside an injunction as having been informally or improperly issued, either because the facts are not sworn to, or not sworn to before competent authority, or because the money has not been brought into court, or for any special matter not touching the general equity of the case, the notice should set out the grounds of the motion. Informalities might be supplied and costs and delay saved.

The second objection is fatal. The money ought to have been in court before the injunction was granted. The older authorities are pretty uniform, that upon a common interpleading bill, the money must be in court before an injunction can issue: *Paris* v. *Gilham and al.*, *Coop. Eq. Rep.* 56; *Prac. Reg.* 39; *Dungey* v. *Angove*, 3 *Bro. C. C.* 36. Later cases hold a different doctrine, and to these may be added the case of *the Earl of Mount* v. *Patterson*, *Barnard. Ch. Rep.* 250; in which lord Hardwicke held it was not necessary that the plaintiff should bring the money into court, unless the other side should require it, but that it is necessary he should make an offer to do so by his bill.

But this is not the case of an ordinary interpleading bill. The party filing the bill is a defendant in a suit at law. A verdict

and judgment have passed against him, and upon this an execution has issued. He seeks now to stay proceedings. The statute is peremptory, that an injunction shall not issue to stay proceedings in a personal action, after a verdict or a judgment, on the application of the defendant at law, unless a sum of money equal to the amount of the judgment, be first paid into court. The plaintiffs have not complied with the requirements of the act, and in my opinion the injunction was irregularly granted and should not stand.

It was contended that the act has no reference to the case of an interpleading bill, in which the defendants at law do not question the claim of the plaintiffs at law, but only to cases where the injunction is sought to be dissolved on grounds affecting the merits of the claim—when the party seeks to interpose some equity to protect himself against the ultimate payment of the money. I am not aware that such construction has been given to the act by the practice of this court, nor do I see any sound reason for the distinction. On the contrary, there appears to be more propriety that the plaintiff in an interpleading bill, who acknowledges himself to be a mere stake-holder, and to have no interest in the money, should bring it into court, than that it should be paid in by a defendant, who, though a recovery has been had against him at law, comes here with an equity sufficiently strong to induce this court to interpose against the regular proceedings of another court for its recovery.

As to the third ground, it is not necessary that I should express any decided opinion. I will merely say, that a pretty extensive investigation has not satisfied me that this is not a proper case for a bill of interpleader.

Let the injunction be set aside.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

APRIL TERM, 1834.

Richard Kinna v. Patrick Smith.

A mortgage before foreclosure, is considered in equity as a chattel interest, and goes to the executor.

It may indeed be said, technically speaking, that the fee in the mortgaged premises descends to the heir at law; but he is a bare trustee for the personal representatives, and as a general rule he need not be a party to a bill filed by the executor for the foreclosure and sale of mortgaged premises.

The assignment of a mortgage, not being by deed, though it may not pass the legal estate, is nevertheless sufficient to transfer to the assignee all the equitable and beneficial interest in the mortgage, including the right to come into equity for relief.

It does not invalidate an assignment, that the subscribing witness to the assignment saw no money paid by way of consideration. If the assignment purports to be for value received, that is, *prima facie*, sufficient.

The lapse of twelve years between the last payment on a bond and the commencement of a suit for its recovery, is not such a length of time as to justify the appellation of a *stale demand*.

The declarations of a mortgagee, or his executrix, made after parting with all interest in the mortgage, cannot affect the rights of the assignee.

Where the answer is directly responsive to the bill, and the defendant answers from his own knowledge, the answer must prevail unless overcome by the tes-

[Kinna v. Smith.]

timony of two witnesses, or by the testimony of one witness attested by strong corroborating circumstances equal to that of another.

BILL for foreclosure, filed April 2d, 1824. The bill states, that the mortgage sought to be foreclosed, bears date on the 2d day of December, 1807, and was executed by John McIntire and wife and Patrick Smith, to Theodore Rouze, to secure the payment of two bonds of even date, given by the said McIntire and Smith to the said Theodore Rouze, each in the penal sum of sixteen hundred and sixty-six dollars and sixty-six cents, conditioned for the payment of eight hundred and thirty-three dollars and thirty-three cents, on the first day of December, 1809. The mortgage was acknowledged on the 6th day of May, and recorded on the 16th day of May, 1808. Theodore Rouze, the mortgagee, died in October, 1813, having executed his will, and appointed his wife, Mary Rouze, executrix thereof, to whom probate was granted; and who, on the 20th day of March, 1815, for valuable consideration, assigned the said bonds and mortgage to the complainant.

The answer of Patrick Smith admits the execution of the bonds and mortgage, but denies that they were assigned to the complainant, and insists that the bonds have been paid and satisfied. A decree pro confesso was taken against the other defendants.

The cause was heard upon the pleadings and proofs.

Wall, for complainant.

L. H. Stockton, for defendant, Patrick Smith.

THE CHANCELLOR. The complainant is the assignee of a bond and mortgage given by Patrick Smith and John McIntire and wife to Theodore Rouze, on the 2d day of December, 1807, to secure the payment of eight hundred and thirty-three dollars and thirty-three cents. In 1813, Rouze, the mortgagee, died, leaving a last will and testament, which was duly proved by Mary Rouze, the executrix therein named. On the 20th March, 1815, the executrix assigned the bond and mortgage to the

complainant, who now seeks to foreclose the equity of redemption in the mortgaged premises, and sell them for the payment of the debt, or the balance that remains due.

The complainant is entitled to a decree in the usual form, according to the practice of the court, unless some of the objections interposed by the defendant, Patrick Smith, (the only one who has appeared to make defence,) shall be sufficient to defeat the claim, either upon the merits, or the manner in which it is now presented to the court.

And first, it is objected to the assignment of the mortgage, that it is improperly made by the executrix: that as executrix, her power extended to the personalty only, and the estate at law in the mortgaged premises having descended to the heir, he should have made the assignment.

This position cannot be sustained. There is no principle better settled at this day, than that a mortgage interest before foreclosure is considered, in a court of chancery, as a chattel interest. It is personal assets, and goes to the executor. This was noted by lord keeper Finch, as early as the 28th of Cas. II., in *Thornbrough* v. *Baker*, and has been held as good law from that day to this: *Fisk* v. *Fisk*, *Prec. in Ch.* 11; *Tabor* v. *Grover*, 2 *Vern.* 367; *Casborne* v. *Scarfe and al.*, 1 *Atk.* 605. It may indeed be said, technically speaking, that the fee descends to the heir at law, but he is a bare trustee for the personal representative. And as a general rule, he need not be a party to a bill filed by the executor for the foreclosure and sale of mortgaged premises. This is a proceeding on the part of the personal representative for the recovery of the debt, and the premises which are pledged for the payment of the debt are under his control, so far as to make the money: *Demarest* v. *Wynkoop*, 3 *John. C. R.* 145; 4 *Kent's Com.* 178. Even when the heir of the mortgagee had foreclosed the mortgage, the executor of the mortgagee being no party, upon a bill by the executor against the heir of the mortgagee and against the mortgagor, the land was decreed to the executor: *Gobe and ux.* v. *Earl of Carlisle*, cited in *Clerkson* v. *Bowyer*, 2 *Vern.* 66. There are some English

cases which appear to hold the principle that the heir is a necessary party to a bill of foreclosure filed by the executor. One of them is the late case of *Scott* v. *Nicoll*, 3 *Russ.* 476; but the reason assigned for it, viz. that if the mortgagor should redeem, there will be no one before the court from whom a conveyance of the legal estate can be taken, shows that it is applicable only to cases of strict foreclosure, and not to cases of foreclosure and sale, as they arise under our laws and practice.

2. The second objection is, that the assignment is not by deed, and therefore the legal estate did not pass by it.

It has been seen that the strict legal estate was not in the executrix; and yet there can be no question, that she might have filed her bill to foreclose and sell the mortgaged lands. The assignment, although it might not pass the legal estate, not being by deed, was nevertheless sufficient to transfer to the assignee all the equitable and beneficial interest, and this includes the right to come into this court for relief. The cases cited from 5 *Halsted's R.* 156, *Den* v. *Dimon*, in which it was held that the assignment of the mortgage must be by deed, does not impugn this doctrine. That was an ejectment case, and the lessor of the plaintiff, holding under assignment from the mortgagor, sought to recover upon the strength of his legal title; and the court, very properly, decided that the legal title was not in him.

3. The third objection is, that the weight of evidence shows that the assignment was never made.

The assignment is in the following words:—"March 20, 1815, for value received, I do hereby assign to Richard Kinna, all my right and title, interest, claims and demands of the within mortgage; as witness my hand and seal, this twentieth day of March, one thousand eight hundred and fifteen, 1815. Mary Rouze, executrix. Witness present, David Remer." The execution of the assignment is proved by the subscribing witness, in the usual form, and I see no good reason to discredit his evidence. It does not invalidate the assignment, that the witness saw no money paid by way of consideration. It purports to be for value received; and that is sufficient, prima facie. The circumstances of

the case may be of such a character, as to show that there was no consideration, or it may be proved by direct evidence. In this case I find nothing to lead to such a conclusion.

4. It is alleged that circumstances show there is nothing due on the mortgage, and therefore the complainant ought not to recover.

One circumstance referred to is, that this is a stale transaction. The mortgage has certainly been suffered to lie longer than is usual, but not so long as to justify the appellation of a stale demand. It was dated in 1807; the last payment on it was in 1812. It was assigned in 1815, and in 1824 the suit was brought. That it should have slept so long after the answer put in, is rather an unusual occurrence. What reason existed for the delay, is not known to the court. The defendant appeared to find no fault with it; and I do not find in it, or in the forbearance exercised towards the defendants before suit brought, any thing to raise a well founded belief that the debt has been paid.

There is nothing in the case to bring it within the equity of the statute of limitation. From the time of the last payment to the commencement of the suit is but twelve years; and if the suit were in a court of law, upon the bond, the statute of limitation would not affect it.

Another circumstance adduced to show that nothing is due on the mortgage, as the defendant contends, is, that the executrix of Theodore Rouze, the mortgagee, acknowledged that she was fully satisfied, and directed the mortgage to be cancelled. A paper writing of the following tenor, has been proved and read in evidence:—"Sir, Please to cancel, and then deliver to Mr. Patrick Smith, a mortgage which he and John McIntire gave to my former husband, Theodore Rouze, as I am fully satisfied for the same. (Signed) Mary Crawford, late Mary Rouze, acting executrix to the estate of Theodore Rouze, deceased. (Dated) Jan. 3d, 1817, (and directed) to Caleb Lloyd, esquire." It is proved by the deposition of James B. Stafford, that on the day this paper bears date, Mary Crawford and Patrick Smith came to his store. Smith wished him to draw the paper, and Mrs. Crawford

assented, and when drawn, she subscribed her name to it on the counter.

If this evidence is competent in any point of view, it appears to me it should have no weight. It was given nearly two years after the assignment of the mortgage—by which act the executrix parted with all her interest in the mortgage; and her declarations, after that, are not to be considered as affecting the rights of the assignee. She cannot be permitted thus to defeat the title she conveyed for a valuable consideration. Besides, it does not appear that she had the mortgage in her possession at the time. She did not deliver it to Smith, nor did he procure its cancellation. The whole proceeding was inoperative, and in my view ought not to be looked on as evidence.

The last objection is, that the answer of the defendant, denying the assignment, and denying also that there is any money due, has not been overcome—it having been disproved by one witness only.

There can be no doubt as to the rule, that when the answer is directly responsive to the bill, and the defendant answers from his own knowledge, the answer must prevail unless overcome by the testimony of two witnesses, or the testimony of one witness accompanied by strong corroborating circumstances equal to that of another. But the rule cannot be applied to this case. The defendant does not undertake to speak from his own knowledge, either as to the assignment, or the payment of the balance of the mortgage money. As to the assignment, he knows nothing; and as to the payment of the balance, he speaks from information.

The complainant is entitled to a decree.

Let it be referred to a master to ascertain the amount due on the mortgage; how much has been paid by the defendant, Patrick Smith, and the liabilities of the other defendants; and the order in which they are to contribute.

Decree accordingly.

ANDREW SNOWHILL et al. v. REBECCA SNOWHILL.

The lands of an infant may be sold for his benefit, and the property changed from real to personal, under the authority and direction of the legislature, without regard to the interests of real or personal representatives. The validity of the title under such sale does not depend on the assent of the infant: he cannot disaffirm the sale on coming of age.

Courts of equity may, and frequently do, change the character of property belonging to infants or lunatics. They will permit trustees or guardians to do it where it is manifestly for the advantage of the owner, without reference to the contingent interests of real or personal representatives.

The authority of the legislature to convert the property of an infant from real to personal, cannot be questioned; and where there is no breach of trust, or violation of good faith, or sinister design, on the part of the guardian who applies for the law, the act cannot be impeached.

Where the property of an infant is changed by authority of a competent tribunal, from real to personal, it will, upon the death of the infant, go to his personal representatives.

Where there has been a breach of trust, as where the trustee or guardian has abused the trust, and changed the quality of the estate to subserve his own interest, there arises an equity to undo the act in favor of the person whose rights are injured.

But there is no equity between the personal representative and the heir, as such. They are both volunteers: each must take what they find at the death of the person entitled for life, in the condition in which they find it.

THE bill in this cause was filed on behalf of the heirs at law of George E. Snowhill, deceased, who died a minor, intestate, against his administratrix, for an account of the proceeds of the sale of the real estate of said intestate, sold in his life-time by his guardian, by virtue of an act of the legislature of the state of New-Jersey, passed upon the petition of said guardian. The material facts disclosed by the bill, appear in the opinion of the chancellor. There was a general demurrer to the bill for want of equity.

The cause was heard upon the demurrer.

Williamson, for defendant, in support of the demurrer.

Scott, for complainants, contra.

Cases cited by defendant's counsel. 1 *Vesey*, 454, 462; 2 *Eden*, 148; 2 *Vesey*, 71; 3 *Bro. C. C.* 515; 5 *Vesey*, 303; 3 *Dow*, 207; *Ambler*, 419; 2 *Eden*, 153; 3 *John. Chan. R.* 570; 1 *Vern.* 435.

Cases cited by complainants' counsel. 1 *P. W.* 713, 215; 2 *Atkyns*, 533; 1 *Bro. C. C.* 497; 2 *Vern.* 52; 3 *P. W.* 217; 1 *Atkyns*, 573; 3 *P. W.* 271; 2 *Mad.* 180; 2 *P. W.* 176; *Ambler*, 370; 3 *Dow.* 337; 1 *Bro. C. C.* 66, 664; 1 *Fonb.* 413.

THE CHANCELLOR. George Snowhill, being seized in fee of certain property in the county of Middlesex, died in 1824, intestate, leaving a widow, Rebecca Snowhill (the present defendant,) and James E. Snowhill, an infant son, and his sole heir at law, surviving him. Letters of administration were granted to the widow; and the balance of personal estate in her hands after the payment of debts, was sixteen hundred and six dollars and seven cents. In 1826, the mother of the infant, who was also his guardian, applied to the legislature of the state for authority to sell an undivided half of certain mills and premises, being the real estate, or part of it, that had descended to the said infant as heir at law of his said father; and having represented to the legislature that the sale of the property and placing out the proceeds thereof on interest would be advantageous for the infant, an act was obtained authorizing the sale of the said real estate by the said Rebecca, with directions that the proceeds of the sale should be placed on interest; one third part thereof for her own use, and the remaining two third parts for the benefit of the infant heir. The property was accordingly sold in April, 1827, for three thousand five hundred dollars, and the amount secured by mortgage. Some time after, the heir died, being still in his minority, and not having made a last will or testament; and the complainants in this suit, who are his heirs at law, claiming to be entitled to the proceeds of said sale, have filed their bill to recover the amount, excepting the interest on the one third part.

The defendant is the administratrix of the decedent, and claims to hold it as personal property.

The defendant has demurred to the bill; and the simple question is, who is legally entitled to the property—the heir at law, or the personal representatives.

The complainants' claim is a novel one; and the court, after looking into it with some solicitude, has been unable to perceive any sound principle to sustain it.

The sale was made, and the property changed from real to personal, under the authority and direction of the legislature. If the act of this high constitutional power could be impugned or drawn in question in any case, it certainly cannot in this; for there is no pretence that any fraud or other unjustifiable means were resorted to, to procure the passage of the law. It professed to act, and we may not doubt, did act, for the benefit of the infant; and in so doing, it is not perceived by the court that it transcended the limits of its power. It is not alleged that there was any breach of trust, or violation of good faith, or sinister design, on the part of the mother of the infant; the whole transaction was fair and honest.

Can we then question the authority of the legislature? Courts of equity may, and not unfrequently do, change the character of property. They will permit trustees or guardians to do it, when it is manifestly for the advantage of the infant: *Amb.* 419, *Inwood* v. *Twyne*. They will convert the property of a lunatic from real into personal for his interest, and this has frequently been done, without reference to the contingent interests of real or personal representatives: *Exparte Bromfield*, 1 *Ves. jr.* 462; same case, 2 *Ves. jr.* 69, in the matter of *Eunice Salisbury*, a lunatic, 3 *John. Chan. R.* 347. If the courts may do it, simply for the benefit or convenience of the owner, who is not qualified to act for himself, we can scarcely, at this day, call in question the power of the legislature itself. It is constantly exercised, and has been for many years. In some cases it may be exerted without sufficient caution; but there is no ground for such a supposition in the present instance.

At the time of the death of the infant the property was changed. It was no longer real, but personal, and went properly into the hands of the personal representative. It must remain there, unless this court shall otherwise decree.

To authorise such interference on the part of the court, there must be some equitable ground; for this court, as well as the courts of law, must exercise its powers on known and established principles.

Where there has been a breach of trust, as where a committee or guardian is entrusted with the care of an estate, and has abused the trust, and changed the quality of the estate to subserve his own interest, there arises an equity to undo the act, in favor of the person whose rights are injured: 1 *Ves. jr.* 462. So in cases where money is agreed or directed to be laid out in land, and either through fraud or accident it is not done, the court, acting within its own peculiar sphere, will consider that done which ought to be done, and carry into effect the intention of the parties. There is a distinct and well known head of equity on which it rests its proceedings.

But there is no equity between the representative and the heir, as such. In the language of lord Rosslyn, in *Oxenden* v. *lord Compton*, 2 *Ves. jr.* 70: "They are both volunteers. Each must take what they find at the death of a person entitled for life, in the condition in which they find it. The legal right is not questioned: then upon what equity must I make this transmutation for the benefit of a person equally a volunteer?" And lord Thurlow, in the case already cited from 1 *Ves. jr.*, says, the change of the property being made for the benefit of the infant, it becomes indifferent whether it be for the benefit of the heir or personal representative afterwards. And he adds, the cases have gone upon the idea, that when it is found to contribute to the interest of the party to make the change, that has been thought so good a reason for it, as to exclude all considerations of hardship or an equity between representatives. The court ought to be very reserved in changing one species of property into another, and to do it only upon pressing occasions;

and when it is done, the only ground upon which I can give it to the one party or the other, must be an equity so distinct as to govern it upon the proper rules of law. And chancellor Kent, in the case of lunacy in 3 *John. Chan. R.* 347, says, the governing principle in the management of the estate, is the lunatic's interest, and not the interest of those who may have eventual rights of succession.

The case cited by the counsel of the complainant, to prove that in a court of equity the heir is ever preferred to an administrator, is not strictly applicable. Lord Macclesfield does indeed make use of that very expression; and to prove the broad position, he adduces the common case, that if a man dies indebted by bond, in which he has bound himself and his heirs, and leaves real and personal assets, of each enough to pay the bond, and the assignee, as he has an election to come upon the real assets, does accordingly sue the heir, and recovers the debt against the heir, yet the heir shall recover back the money against the executor out of the personal estate: 2 *P. W.* 175, *Edwards* v. *the Countess of Warwick.* This case proves, that in the payment of debts, personal assets are first liable; and of course to that extent, or in a matter of that kind, the heir is always preferred to the executor. This principle is well established. But it does not prove the proposition contended for by the complainants, nor can I find a single authority that does.

The fact urged at the bar, that the infant died before he arrived of age, and therefore there could have been no assent on his part, does not vary the case. The validity of the title did not depend on his assent. If he had lived he could not have disaffirmed the sale on his coming of age.

Upon the whole case I am of opinion there is no equity in the claim. The demurrer is well taken, and the bill must be dismissed, with costs.

REUBEN SHREVE v. JOSEPH VOORHEES et al.

Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminution or alteration.

He has no right to use the water to the prejudice of other proprietors above or below him. He may use it while it runs over his land, but cannot unreasonably detain it, or give it another direction.

An exclusive enjoyment of water or of light, or of any other easement, in any particular way, for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person, which might have been, but was not asserted.

A trivial or unimportant interference, such an one as does not sensibly and plainly interrupt the complainant's enjoyment, will not call for or warrant the restraining power of a court of equity.

As against a riparian owner seeking to erect an improvement on his own land, the complainant ought to show that his superior rights have been or will be, not probably, but really and sensibly affected.

If the complainant is secured in the enjoyment of the use of the stream as he has heretofore had it, without any sensible and material alteration so as to occasion an actual injury, it is all he can require.

BILL for injunction, to restrain the obstruction of a water-course, to compel the removal of obstructions already erected, and to account for damages done by such erecting obstructions, filed October 2d, 1833. An answer was filed by all the defendants. The material facts contained in the bill and answer are fully stated in the opinion of the chancellor.

The cause was heard upon motion to dissolve the injunction upon the answer of the defendants.

Wall, for defendants, in support of the motion.

Randolph and *Williamson*, contra.

Cases cited by defendants' counsel. *Angel on Water Courses*, 2, 5, 27, 28, 29, 31, 36, 37, 39; 3 *Kent's Com.* 439, 353.

Cases cited by complainant's counsel. 2 *Blacks.* 403; 17 *Mass.* 289; 10 *Serg. and R.* 69; 3 *Hals.* 139; 5 *Hals.* 74; 4 *Ran.* 58; 1 *Sim. and Stuart*, 20; 3 *Kent's Com.* 353, 355, 358; 17 *Johns. R.* 306; 15 *Johns. R.* 217; 2 *John. Chan. R.* 164; 1 *Mad.* 155; *Eden on Inj.* 157; 3 *John. Chan. R.* 282; 1 *Bro. C. C.* 588; 1 *Ves. sen.* 140; 5 *John. Chan. R.* 101; 10 *Vesey*, 192; 1 *Chan. Cas.* 574; 7 *Vesey*, 308; 17 *Vesey*, 128; 1 *Cox*, 102; 6 *John. Chan. R.* 19; 2 *Ibid*, 167; 3 *Ibid*, 287; 1 *Wils.* 174; 6 *Cranch*, 51; 9 *Cranch*, 160.

THE CHANCELLOR. The complainant's bill is, in substance, as follows:—That he now owns, and since the year 1804 has owned and occupied, a valuable mill-seat at Tinton falls, in Monmouth county, on which is erected a valuable grist and saw mill. The mills are on a stream of water called Falls river, and were purchased, with the privileges and appertenances, by the complainant, in 1804, of Barnes B. Smock, who had occupied them for many years before. That these mills are further up the stream than any other mill, and that he, and those under whom he claims, have for more than fifty years exercised and enjoyed the exclusive use and ownership of the said stream and its tributaries, without having their rights disturbed or questioned, and were the first occupants. That in the year 1773, Daniel Hendrickson, senior, owned and occupied the said mills, and in order the more effectually to secure to himself the exclusive and peaceable enjoyment of his privileges, obtained of one Lewis Pearce Ashfield, the then owner of the beds of the said Falls river and tributary streams thereof for some distance above the said mills, a grant or quit-claim in writing of all his right of and in the said several streams of water. That afterwards, Daniel Hendrickson conveyed the said mills and mill-seat, waters and water-courses, and all his right and title to the same, to Daniel Hendrickson, junior, and John Holmes, who conveyed them to the said Barnes B. Smock, from whom the complainant purchased.

The complainant then charges, that the defendants have threatened and attempted to disturb him in his rights and privi-

leges, by damming up the said stream above his mills, and erecting mills thereon, to his great damage and irreparable injury. That they have, without the consent of the complainant, commenced operations to erect their said mills and construct a dam; that they have commenced digging, and draining and damming the water of the complainant, about six hundred yards above his mill, and have already obstructed the stream and diverted it from its natural course, by sinking in timber and other materials, and thus infringed his right, and damaged and greatly endangered the safety and enjoyment of the said property.

The complainant further alleges, that if the defendants are permitted to go on and erect a mill so near to his, and on the same stream, and to be supplied with water from the same source; that by damming up and obstructing the said water-course and withholding the water, and then letting it out at unreasonable times and in undue quantities, as they necessarily must, to keep their mill in operation, according to the nature and usual course of milling business, his right and property will be greatly impaired, if not entirely ruined.

The bill prays, that the defendants may be decreed to remove the obstructions already placed in the stream, and make restitution for the injury sustained thereby; and that they may be injoined from erecting their said contemplated mill on the said river or any of its tributary streams above his mill, and from using the water, or any part of it, for milling purposes.

On filing this bill an injunction was issued.

The defendants, in their answer, admit that the complainant occupies, and for a number of years past has occupied, a mill-seat, with a grist and saw mill, at Tinton falls; but do not admit his title, and leave him to prove it as he may be advised. They believe he purchased of Barnes B. Smock, whatever interest he possesses in them. They admit the complainant's mills are higher up the stream than any other mill; but deny that he, and those under whom he claims, have for more than fifty years, or for any period of time, exercised, possessed and enjoyed the exclusive use and ownership of the said Falls river, with the said

tributary streams, for milling purposes. They deny, also, that he and those under whom he claims, have for thirty or fifty years, or for any other time, occupied and enjoyed the same as the first occupant, further than this, that they have enjoyed the use of the water, as it flowed in its natural channel, for milling pusposes, within the limits of their mill-seat, including the flowage appertenant thereto, but no further; and they expressly deny that the complainant has any right, at law or in equity, to the stream or its tributaries, or to the land under the water of the streams, further up the stream than he actually uses or occupies at his mill-seat. And they allege, on the contrary, that Joseph Voorhees, one of the defendants, and those under whom he claims, have been in the peaceable possession, for fifty-four years last past, of the land on the east side of said Falls river, including the said river to the *filum aquæ*, next immediately above the flowage of the said complainant, as tenant in fee, claiming adversely to all others; and that the other two defendants, Joseph H. Van Mater and Holmes Van Mater, and those under whom they claim, have been in the peaceable possession of the lands on the west side of the stream, including the said stream to the *filum aquæ*, next immediately above the flowage of the complainant, as tenants in fee, for at least forty-one years; and that the spot where they calculated to place their mill is within these boundaries. That while the complainant's mill was occupied by Daniel Hendrickson, senior, there was a saw-mill in operation upon one of the tributary streams, adverse to the pretended claims of the complainant.

They state, that they have heard that the complainant set up a claim or title to the bed of the river and its tributaries, from one Lewis Pearce Ashfield, but what this claim or right is they leave to be proved. They deny, however, that he has any right or title to the beds of the river or its tributaries inconsistent with, or adverse to, the titles and interest of the defendants. The defendants admit that they raised the frame of a saw-mill across said stream in September or October last, and were preparing to erect a dam for said mill, in such manner as not to divert the

water from its natural channel, about thirty-eight or thirty-nine chains from the mill of the complainant, and above his pond and flowage, as they had a legal right to do, when they were restrained by the injunction of this court. They insist that they have a right to the use of the water while flowing over their lands, and expressly deny any intention to divert it from its natural channel, or in such a way as that the complainant's rights or use of the same would be in any way affected, further than by a legal and reasonable use of the waters by these defendants on their own lands. They deny that they have obstructed the stream, or injured the complainant's enjoyment, further than was unavoidable to the common use of the water in the stream; and insist, that if they are permitted to go on and complete their mill, no other injury could arise to the complainant than the reasonable retardation of the waters of said stream, at times, consistent with the common use of the water, and the effect which a rival saw-mill might have on his profits. They deny that the complainant has sustained, or can by the completion of the mill or dam sustain, an irreparable injury; their only object being to enjoy their rights as riparian proprietors in a way not inconsistent with the common rights of the complainant.

The motion to dissolve the injunction in this case, raises an important question. Water rights are daily becoming more valuable in our state, and it is greatly to be desired that every point raised in reference to them, should be settled on just and permanent principles. The natural rights of riparian proprietors are not to be taken away on slight grounds; and the acquired rights of prior occupants, whatever those rights may be, are to be carefully protected.

It is important to ascertain precisely the situation of these contending parties, as presented by the pleading.

The complainant, and those under whom he claims, have been in possession of the mill at Tinton falls sixty years. They were the first occupants, and may be considered as having been the exclusive occupants of the stream above their mill. The fact set out in the answer, that while the complainant's mill was

in possession of Daniel Hendrickson, senior, there was a saw-mill in operation on one of the tributary streams, adverse to the pretended claims of the complainant, is too vague and indefinite to have any weight in the decision of this question. This possession of Daniel Hendrickson, senior, was as early as 1773. How long it continued does not appear, but from the fact that the mills have been in the hands of the present owner for thirty years, and that after being possessed by Daniel Hendrickson, senior, they were owned and possessed by Daniel Hendrickson, junior, and John Holmes, and afterwards by Barnes B. Smock, who sold them to the complainant in 1804. We may safely conclude that the time spoken of, when the saw-mill was on one of the tributary streams, was at least forty years ago. How long it had been there, how long it remained, or what became of it, and whether it was so situated as to interfere in any manner with the flow of the water at complainant's mill, are all matters on which no information has been given to the court.

The complainant, then, has been in possession of the mill, and in the exclusive enjoyment of the stream of water flowing to the mill, without any kind of hindrance or molestation, for a long period of time. So far as his boundaries extend, he has been in possession, and enjoyed the use of the stream, as riparian proprietor. Beyond and above that, he has enjoyed the flow of the water, or so much as was necessary and convenient for the use of his mills, by occupancy and appropriation.

The title that the complainant seeks to establish under the grant or quit-claim from Ashfield, does not appear to the court entitled to much weight. Unaccompanied by possession, it would present rather a doubtful claim as against the shore owners, it purporting to be a grant of the mere bed of the river, made by one who is not alleged to have been in possession at the time, either of the bed of the river, or of the adjacent banks. The extent, too, of the grant is uncertain; for it is not stated how far it extended, nor whether it included the bed of the river at the spot where the defendants seek to place their mills and dam. This latter uncertainty was sought to be remedied by an amend-

ment to the bill; but as the bill, since its amendment, has not been resworn to, the allegation cannot be considered within the case, as now presented.

It does not appear to the court, however, that the complainant's case is materially varied by laying out of view the alleged grant from Ashfield. At the time the defendants commenced their operations, he had been in possession of the flow of the water to his mill sixty years, and this length of possession, as will be presently seen, is equivalent to a grant.

The defendants, on the other hand, are riparian proprietors; they own the property lying above and next adjoining the complainant's, and have owned the one bank for fifty-four years, and the other for forty-one years. They claim to use and enjoy the stream or flow of water, as such proprietors, in common with those owning above and below.

This I take to be the situation of the parties, according to the case made. The difficulty is to apply the law.

The natural rights of riparian owners are well defined. Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, (*currere solebat*) without diminution or alteration. He has no right to use the water to the prejudice of other proprietors above or below him. He may use it while it runs over his land, but cannot unnecessarily detain it, or give it another direction. These are the principles applicable to persons who claim as proprietors simply, standing upon their natural rights: 2 *Black. Com.* 14; 3 *Kent's Com.* 353.

The natural rights of riparian owners may be changed by circumstances. A prior occupancy of the stream, is considered an appropriation of it; and if such an appropriation be made, as if, for instance, a mill or any artificial work be erected on a stream of water not before occupied, the person so making the appropriation, may acquire rights by it, as against the riparian proprietor.

How far those rights, if any there are, may extend; whether simply a prior erection of a mill or occupancy of the stream

by one owner, unaccompanied by length of possession and enjoyment, will prevent the owner above or below him from a similar erection on his own ground, within a reasonable time, though it may interfere with the first occupant, are questions not within the present case, and do not call for the consideration of the court.

When there has been an enjoyment of a stream of water in a particular mode, for a long period of time, without interruption on the part of other proprietors, their natural rights may be seriously impaired, and even entirely lost. The person in possession is considered as having acquired a title, and as having a right to remain undisturbed in his possession as he has held and enjoyed it. In England, the lapse of time necessary to secure this right is twenty years: *Bealey* v. *Shaw*, 6 *East. R.* 208; *Balston* v. *Bensted*, 1 *Camp.* 463; 2 *Barn. and Ald.* 662; 1 *Sim. and Stu.* 190. After a quiet and peaceable enjoyment for twenty years, the court will presume a grant; not, says lord Mansfield, because in such cases the court really thinks a grant has been made, but they presume the fact for the purpose, and from a principle of quieting the possession. The same principle has been adopted and acted on in this state. "Statutes of limitation," says chief-justice Ewing, in the case of *Campbell* v. *Smiths*, 3 *Halst.* 145, "are not deemed to comprehend in terms and within their purview, the right now under consideration; but upon the wise principles of such statutes, and in analogy to them, to quiet men's possessions, and to put an end and fix a limit to strife, a rule is established, that after the lapse of the period mentioned in those statutes, a grant will be presumed. The period of twenty years is settled in England, according with the time mentioned in the statute of 21 Jac. 1. Our statute prescribing a like period, our rule is the same." The same rule has been adopted in New-York and in other states; and it is now held as the general and established doctrine, "that an exclusive enjoyment of water, or of light, or of any other easement in any particular way for twenty years without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person, which might have been, but was not,

asserted:" 3 *Kent's Com.* 356. This I consider to be the law in New-Jersey.

In the case now before the court, the parties do not stand upon their natural rights as riparian owners; nor are they in the situation of owners, one of whom has by accident or forecast got the start of the other in the race of improvements; but the complainant has had an undisturbed possession of the stream and flow of the water in a particular way, and for a particular purpose, more than twenty, and perhaps full sixty years. He has, then, a title to the use of the water. So far as it flows through his own land, he has title by actual grant; and so far as it flows through the lands of the defendants, and is material for the use of his mills, he has title by long and uninterrupted occupancy, which is equivalent to a grant; and he is entitled to remain undisturbed in his possession: *Saunders* v. *Newman*, 1 *Barn. and Ald.* 258; *Van Bergen* v. *Van Bergen*, 3 *John. Chan. R.* 282; 3 *Kent's Com.* 359.

It follows, then, as a necessary consequence, that if the erection of the mill and dam at the place contemplated by the defendants, will affect the flowage of the water so as to prevent the complainant from enjoying it in the mode and to the extent he has formerly enjoyed it, and thereby do him an injury, it will be a direct infringement of vested rights, and the court is bound to afford protection.

It is not to be understood that a trivial or unimportant interference—such an one as does not sensibly and plainly interrupt the complainant's enjoyment, will call for or warrant the restraining power of the court. So strict a construction of the rule might greatly embarrass and impede the progress of improvement on many of our streams, and would be contrary to the practice of the court. It is common to restrain a defendant from building so near the plaintiff's house as to darken his windows, if they be ancient lights, but it is not universal. In 1 *Dick.* 164, *Fishmongers' Co.* v. *the East India Co.*, the court said, it was not every diminution in the value of the premises, nor every species of mischief, upon which an action on the case might be main-

tained, that would be sufficient ground to interpose by injunction. The foundation of the jurisdiction, is that sort of material injury to the comfort of the existence of those who dwell in the neighboring house, which requires upon equitable principles the application of a power to prevent, as well as remedy, the evil. The doctrine contended for by the complainant, that having established a right by prior occupancy, he is to be protected against all possible interference, is as unsound as the one sought to be established by the defendants, that they are entitled to all the natural rights of riparian owners. The truth is between them. The one has acquired a right to the ordinary and constant flow of the water, or so much as is required for the usual puposes of his mill. The others have lost the natural right of using the water in common—their enjoyment must be subject to that of the complainant.

It was well remarked at the bar, that if the defendants' rights were restricted, those of the complainant were not without limit. This is undoubtedly true. He cannot, under pretence of prior occupancy, though accompanied by the presumption of a grant, cover the whole extent of the stream and its tributaries, and insist that because no dam or obstruction has existed heretofore, therefore there shall be none in time to come. As against a riparian owner, seeking to erect an improvement on his own land, he ought to show that his superior rights have been or will be, not probably, but really and sensibly affected; in other words, he ought to show that such erection would so obstruct the natural flow and impetus of the water as to do him an injury.

How stands the matter upon the facts disclosed? The complainant says the defendants have commenced digging and damming the water, about six hundred yards above his mill, and have already obstructed the stream and diverted it from its natural course by sinking in timber and other materials, and thus infringed his right and damaged and greatly endangered the safety and enjoyment of the said property. It would have been satisfactory to the court, in a case of this kind, if the complainant had given information of the nature of the stream, its cur-

rent and fall. It does not follow in all cases, that a dam erected six hundred yards above another one on the same stream, although the natural current of the water is obstructed at that particular place, will materially affect the enjoyment of the stream at the mill below; and it is very important that, in a matter of this description, the court should act with circumspection, and upon certain information.

The defendants deny any damage further than was unavoidable to the common use of the water. If, then, any damage or interruption, however small it might be, would call for the restraining power of this court, the complainant's case is made out. But it has already been stated, that the plaintiff should show a sensible injury—one that is obvious and plain—to warrant a proceeding that shall take away all right from the defendants. I cannot feel satisfied that this has been done in this case; and so far as the continuance of the injunction rests on the ground of damages already done, I should be inclined to say the ground as exhibited is insufficient.

But the complainant alleges that the defendants are going on further to obstruct the water; that by damming up and obstructing the stream, and withholding it and then letting it out at unreasonable times and in undue quantities, his property will be greatly impaired, if not ruined entirely. The apprehension of an unreasonable and improper use of the stream, furnishes in itself no ground for an injunction. It must be supported by facts to show that there is sufficient cause for a reasonable belief that such will be the case. And although the charge of the complainant is, that the defendants must *necessarily* do it to keep their mill in operation, according to the nature and usual course of milling business, I feel unwilling to rest upon so general an allegation.

Still, the complainant is entitled to full protection against injurious and improper interference. The claim of the defendants to all the rights of riparian owners, cannot be sanctioned, except so far as their exercise may comport with the free use of the stream as formerly enjoyed by the complainant. That such ex-

ercise has heretofore, or will hereafter, do a material injury to the complainant, I am not so well assured of, as to feel justified in saying that the defendants shall wholly desist and be entirely deprived of the right of using the water on their own land for milling purposes.

I cannot, therefore, sustain the injunction as it now stands. It is too broad. Nor do I feel at liberty to dissolve it. This would leave the complainant too much in the hands of the defendants. I see no difficulty, however, in so modifying the injunction, as to protect and secure the rights of both parties. If the complainant is secured in the enjoyment of the use of the stream as he has heretofore had it, without any sensible and material alteration, so as to occasion an actual injury, it is all he can require or is entitled to. To that extent the court deems it right to go, and no further. If the defendants, after a full knowledge of their situation and rights, shall clearly entrench upon the privileges of the complainant, the power of the court is sufficient to give him ample protection and relief.

If the complainant should be fearful that the injunction so modified will be too indefinite and uncertain, and that nothing short of an absolute restraint upon the defendants will secure him; and believes that he can present the case with more particularity and precision, so as entirely to satisfy the mind of the court, he will be at liberty so to present it at any time.

Let the injunction be modified so as to conform with the principles adopted by the court, and that without costs.

ROBERT LEE v. WILLIAM WOODWORTH et al.

A mortgage deed contains the following description:—"All that certain tract or lot of land, situate in, &c. on the south-east side of the farm or plantation late the property of J. C. deceased; bounded on the S. W. by the public road leading from New-Brunswick to South river bridge, and N. W. by lands late Benjamin Tuthill's, deceased, N. E. by other lands of the parties of the

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first part, and on the S. E. also by other lands of the said parties of the first part, containing fifty acres; or the next and nearest adjoining thereto fifty acres of land, of and belonging to the said farm or plantation now in the joint or separate possession of the aforesaid James, Alfred and Edward Crommelin that is unincumbered, provided the first fifty acres herein described is in any way incumbered so as to defeat the title hereby made or intended to be made to the said Robert Lee." The mortgage is not void for uncertainty as to either of the tracts therein referred to.

The whole farm is subject to the mortgage, and may be taken to satisfy it if necessary. A strip of fifty acres on one side is to be resorted to first; if that should be so incumbered as to defeat the title, or prove insufficient to raise the money, then the next adjoining fifty acres is to be resorted to, and so on by separate and adjacent parcels of fifty acres, until one is found not so incumbered as to defeat the title and claim of the mortgagee.

A line drawn parallel to the south-east boundary line of the farm, so as to include fifty acres, will define with accuracy the first lot of fifty acres intended to be mortgaged.

And the mortgage does not fail against the nearest adjoining fifty acres described as *unincumbered*, although the whole property should be incumbered.

A mortgage duly registered is notice to all the world, and if there be ambiguity on the face of it, it is sufficient to put subsequent purchasers upon enquiry.

BILL for foreclosure, filed 16th November, 1829. Woodworth and others, who subsequently purchased the premises, answered, admitting the complainant's mortgage, but insisting that they were bona fide purchasers for value, without notice; and that the mortgage, except as to the first fifty acres described therein, is void for uncertainty. The cause was heard upon the pleadings.

F. B. Chetwood and *Williamson*, for complainant.

G. Wood, for defendants.

Cases cited by complainant's counsel. *Cowper*, 600, 362; *Douglass*, 382; 7 *Mass.* 384; 1 *Mass.* 227; 3 *D. and E.* 442.

Cases cited by defendants' counsel. 2 *Sch. and Lef.* 648; 1 *Reports*, 87, 88; 2 *John. Chan. R.* 190; 6 *Ibid.* 417.

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THE CHANCELLOR. On the 30th of August, 1826, Alfred Crommelin and Edward Crommelin, together with James Crommelin, now deceased, owning and possessing, as tenants in common, a certain farm or plantation, situate in North-Brunswick, in the county of Middlesex, late the property of James Crommelin, the elder, deceased, gave a mortgage to Robert Lee, to secure the payment of three hundred and seventy-one dollars and eleven cents. The mortgage conveyed and confirmed to the said Robert Lee, "all that certain tract or lot of land, situate in the township of North-Brunswick, county of Middlesex, New-Jersey, on the south-east side of the farm or plantation late the property of James Crommelin, deceased; bounded on the south-west by the public road leading from New-Brunswick to South river bridge, and north-west by lands late Benjamin Tuthill's, deceased, north-east by other lands of the parties of the first part, and on the south-east also by other lands of said parties of the first part, containing fifty acres; or the next and nearest adjoining thereto fifty acres of land, of and belonging to the said farm or plantation now in the joint or separate possesion of the aforesaid James, Alfred and Edward Crommelin that is unincumbered, provided the fifty acres first herein described is in any way incumbered so as to defeat the title hereby made or intended to be made to the said Robert Lee."

James Crommelin was the owner of nine undivided fourteenth parts of the farm, Alfred owned three parts, and Edward the residue. Before the execution of this mortgage, James had incumbered his share to a considerable amount. He died in 1827, and his interest was afterwards sold in 1830, to satisfy the incumbrances. The amount produced by the sale was insufficient to pay all, and no part of it was applied to the satisfaction of the complainant's claim.

After the making of the mortgage, Edward mortgaged his share of the same to Miles C. Smith, and also to the executors of William Paterson, deceased; and afterwards, in 1827, he and Alfred sold all their interest in the property to Thomas E. Davis. This interest has become vested, by divers mean conveyances, in

William Woodworth, Thomas Loud, John Loud, Philologus Loud, and Joseph E. Loud, who are now in possession, and parties to the suit.

Nine fourteenth parts of the fifty acres specifically pledged or granted in the mortgage as a security for the payment of the debt, having been sold to satisfy prior liens, the complainant seeks to foreclose the equity in the remaining five fourteenth parts and sell it, and if that should prove insufficient, then to sell the mortgagors' interest in the next or nearest adjoining fifty acres, and so to continue until the money shall be made.

Those of the defendants who are owners of the property by purchase, to wit, Woodworth and the Louds, have answered the bill. They admit all the material facts in their answer, but set up two grounds of defence. One is, that they are purchasers for a valuable consideration, without notice; and the other, that except as to the fifty acres specifically designated, the deed is void for uncertainty.

So far as the complainant seeks to foreclose and sell the right of redemption of Edward and Alfred Crommelin in the fifty acres, he is entitled to a decree in the usual form. Whether he has any further rights, depends on the construction now to be given to the instrument.

The deed, so far as relates to the description of the property intended to pass by it, is unskilfully and inartificially drawn. It wants that certainty and precision which constituted the beauty of the old common law conveyances, and gave safety to both purchaser and vendor, and which in modern times has been too much neglected, especially in our own country. The genius of our institutions, and the policy of the laws, tend to remove as far as may be, all impediments to the alienation of real property, and place it upon the same footing with personalty, as nearly as the essential difference in the two species of property will warrant. Hence real estate is mortgaged and sold, and passed from hand to hand, with scarcely any of the solemnities that formerly attended transactions of so grave a character; and the evidences of title are frequently prepared by the parties, or by those who

know less of their nature than they do themselves. Nevertheless, they are not to be rejected for want of form, if by law they may be sustained.

The first and most important rule in the construction of deeds, is, "that the construction be favorable, and as near to the minds and apparent intents of the parties as possible it may be, and law will permit." The reason for this rule is given briefly, but forcibly, by lord Coke; "*propter simplicitatem laicorum*;" and there was never a time when the rule was more needed than the present, or when the reason of it was more apparent. Taking this rule as a guide, I cannot doubt as to the course of duty in this case.

It must be plain to every one, that the mortgagee was not satisfied with the security of fifty acres, and that he did not intend to be limited to that quantity, if it should turn out to be insufficient; and I think it equally plain that the mortgagors intended fully to secure him, and that, in case the fifty acres failed to do it, he should be at liberty to resort to other property to make the money. If the fifty acres, and no more, were to be subject to the lien, no possible reason can be assigned why any thing was said about other fifty acres next adjoining it. It was useless, and worse than useless; the only effect of it being to beget doubt and confusion, where every thing should be clear and certain.

The contingency upon which other than the fifty acres were to be taken and applied to the payment of the debt, is clearly specified:—"Provided the fifty acres first herein described is in any way incumbered so as to defeat the title hereby made or intended to be made to the said Robert Lee." It is not disputed by any that the contingency has happened—that the fifty acres first described, or that part of it which remains unsold, is insufficient to satisfy the mortgage. Then we are in possession of these facts:—

1. That more than fifty acres were intended to be covered and secured by the mortgage, and applied to the payment of the mortgage debt, in case a certain event should take place; and,

2. That the event, or the contingency to be provided for, has actually happened.

The question, then, is fairly presented: Is the deed (or mortgage) so uncertain and obscure as to prevent the court from arriving at the clear intention of the parties, and carrying that intention into effect? Let it be carefully examined. The first fifty acres mentioned in the mortgage, are described as lying on the south-east side of the farm, bounded on one side by a public road, on another side by lands of Benjamin Tuthill, deceased, and on the remaining two sides by other lands of the mortgagors. This is a sufficient description. It is a strip of fifty acres, on the south-east side of the farm; and the farm is described with convenient certainty as the farm late of James Crommelin, deceased, and also by its general boundaries. A line drawn parallel to the south-east boundary line of the farm, so as to include fifty acres of land within the deed, would describe with accuracy the land intended to be mortgaged. If this should prove incumbered so as to defeat the mortgage, then "the next and nearest adjoining thereto fifty acres of land of and belonging to the said farm or plantation now in the joint or separate possession of the aforesaid James, Alfred and Edward Crommelin," that is unincumbered, is to be taken. There can be no difficulty in ascertaining the next and nearest adjoining thereto fifty acres of land; a single parallel line will give it with mathematical exactness. But according to the letter of the mortgage, it must be fifty acres unincumbered. Now if it turns out that the whole property was at that time, or is now incumbered, does the mortgage fail?—is the remedy gone entirely? I think not. The whole of the property was incumbered at the very time of making the mortgage. This was surely known to the mortgagors; and from the very provision now under consideration, it is plainly to be inferred that the complainant also knew it, or he would not have desired more than fifty acres of land as a security for the small sum of three hundred and seventy-one dollars and eleven cents. It cannot then be supposed, they intended fifty unincumbered acres, when in truth there were none such to be found.

If then the next fifty acres, although incumbered, may be taken, and they also should prove insufficient, are the rights of

the complainant at an end, or may he resort to fifty acres more? I think he may resort to the next fifty acres, and continue to do so until the mortgage money is raised.

I consider the true meaning of the parties to have been this; that the whole of the property should be subject to the mortgage, and might be taken to satisfy it, if necessary: that if it became expedient to resort to the land to raise the money, a strip of fifty acres on one side was to be resorted to in the first instance; if that should be so incumbered as to defeat the title, or prove insufficient to raise the money, then the next adjoining fifty acres were to be resorted to, and so on by separate and adjacent parcels of fifty acres until one was found not so incumbered as to defeat the title and claim of the mortgagee.

It appears to me this is fairly and plainly to be gathered from the mortgage itself, and that too without taking as great a latitude of construction as is admitted to be proper in the construction of deeds. If this be not the true construction, the whole clause must be taken as senseless, and rejected entirely.

"The rules laid down for the construction of deeds," says lord Mansfield, "are founded in law, reason and common sense: that they shall operate according to the intention of the parties, if by law they may: and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention:" *Good title* v. *Bailey*, *Cowp.* 600. In that case an instrument was held to be a grant, although no words of conveyance were used, except the special form of words applicable to a release only; upon the ground that the intention of the parties was to pass all the right in the premises. And justice Aston, in the same case, says, It is clear from the general complexion and circumstances of this case, that there has been some dispute between the parties, and that this release was an agreement between them for the purpose of adjusting all matters in difference; and principally, on the ground of intention thus collected, he concurred with lord Mansfield. The same point is decided in 7 *Mass. R.* 384, *Pray* v. *Pierce*. In *Bache and al.* v. *Proctor*, *Doug.* 382, it was held by the same judge, and also by Buller, judge,

that a bond, with the condition that the obligor should render to the plaintiffs a true, just and perfect account in writing of all and every sum and sums of money, that he should receive for the relief and maintenance of the poor of the parish; meant not only that an account should be rendered, but the money paid; and a suit upon the bond, alleging the non-payment as a breach of the condition, was sustained, on the ground that it was clearly the intention of the parties, and the fair construction of the instrument.

A deed containing no words of grant in the premises, was held to pass the fee, on the ground that taking the whole deed together, it could not be doubted that the intention was to pass the fee. In that case, chief-justice Parsons said, the rule that when the intention of the parties can be discovered by the deed, the court will carry that intention into effect, if it can be done consistently with the rules of law, is founded in good sense, and ought always to govern us.

If, then, the intention of these parties was as I have stated it to be, it is the duty of the court, according to the authorities cited and many others that might be added, to carry the intention into effect, unless there be some rule of law to prevent it. I know of none that can apply to this case. The defendants stand in the place of the original mortgagors, claiming through them, and are bound by their acts.

The objection set up in the answer, that they are bona fide purchasers for a valuable consideration and without notice, and that therefore the property ought not to be charged in their hands, cannot avail them. The mortgage was duly registered, and was notice to all the world. If there was any ambiguity on the face of it, it was sufficient to put them upon inquiry. This is not like the case of a mistake of the amount in registering a mortgage. There the record is notice only of the amount that appears. When the amount is specified, it must be considered as truly set out in the registry, and there is nothing to induce further search.

It is the opinion of the court, therefore, and it is so decreed, that the complainant is entitled to a sale of the five undivided

fourteenth parts of the fifty acres specifically described in the mortgage; and if that should prove insufficient to satisfy the mortgage and costs, that he be at liberty to make sale of five undivided fourteenth parts of the next adjoining fifty acres, and so continue until the debt and costs are fully satisfied.

Decree accordingly.

WALTER KING v. JOHN W. BERRY and BRANT VAN BLARCOM, Executors of WILLIAM BERRY, deceased.

The claim to a legacy is essentially an equitable and not a legal claim, and the character of the right is not altered by making it cognizable in the common law courts. It is an assignable interest, and the assignment passes the whole right of the assignor.

Is it barred by the statute of limitations?—*Quere.*

Legatees who have assigned all their interest, are not necessary nor proper parties to a bill filed by the assignee for a recovery of the legacies.

The orphan's court and court of chancery have, to a certain extent, concurrent jurisdiction in reference to the accounts of executors, administrators and guardians; but in all cases where a party seeks relief on grounds peculiarly of chancery jurisdiction, and which call for the exercise of chancery powers, the jurisdiction of chancery is paramount.*

THE bill, filed on the 29th day of November, A. D. 1831, states, that William Berry, late of Paterson, in the county of Essex, and state of New-Jersey, being seized and possessed of considerable real and personal estate, made and published his last will and testament, bearing date on the 7th day of January, A. D. 1826, and executed in due form of law, to the purport and effect following, that is to say: "Be it remembered, that I, William Berry, of Paterson, in the county of Essex, and state of New-Jersey, do make and publish this my last will and testament, in manner and form following, that is to say: First, it is my will, and I do hereby order and direct my executors herein

* Accord. *Salter* v. *Williamson*, ante, vol. i. page 480.

after named, to pay all my just debts and funeral expenses out of my personal estate. Item—It is my will, and I do hereby order and direct my executors, at or after my decease, to sell all my real and personal estate that I may be possessed of at my death: it is my will, and I do hereby empower my executors at or after my decease, to pay over to Robert Fields one hundred dollars. Item—I give, devise and bequeath unto my brothers, Daniel Berry and John Berry, and to my late wife's brothers, William Sumpter, John Sumpter and James Sumpter, and to my nephew Jonathan Berry, son of James Berry, deceased, and to John Sumpter and James Sumpter, sons of John Sumpter, all my estate, to have and to hold from and after my death; the said Jonathan Berry, son of James Berry, deceased, to have two shares after an equal division is made of all my estate, subject, however, to the payment of legacies herein mentioned; and in case I should outlive my brother Daniel, then it is my will, and I do hereby give, devise and bequeath his part or portion of my estate to the children of my brother Thomas Berry. Item—I give and bequeath unto the four daughters of my late brother, Samuel Berry, deceased, the sum of twenty-five dollars each; and I give and bequeath unto Mary, the daughter of my late brother, James Berry, deceased, and to the daughter of my late brother, David Berry, deceased, the sum of fifty dollars each; and I give and bequeath unto Nancy Chorton, wife of John Chorton, the sum of twenty-five dollars; and I do hereby nominate, constitute and appoint, John W. Berry and Brant Van Blarcom, executors of this my last will and testament." The testator departed this life on the 12th day of February, A. D. 1826, leaving the said will unrevoked and in full force. That the executors therein named have duly proved the said will before the surrogate of the county of Essex, and taken upon themselves the execution thereof; and by virtue thereof have possessed themselves of the testator's personal estate and effects to an amount far greater than sufficient to pay his debts and funeral expenses, and also entered into possession of his real estate, and into the receipt of the rents and profits thereof, and so continued until they made sale there-

of. That they exhibited into the surrogate's office of the county of Essex an inventory of the personal estate of the deceased, amounting to five thousand one hundred and seventeen dollars and sixteen cents, and that they afterwards made sale of two parcels of his real estate, the proceeds whereof amounted to two thousand two hundred and fifty dollars.

The bill further states, that all the legatees named in said will, except Robert Fields, resided in England, and that the complainant, by virtue of three several deeds of assignment, became the purchaser and legal owner of all the legacies, shares, rights and interests given and secured by the said will, except the legacy of one hundred dollars given to Robert Fields, and the legacy of twenty-five dollars given to Nancy Chorton, and is entitled to receive the same from the defendants.

That the said executors filed no account whatever of the said estate, until the complainant caused a citation to be issued out of the orphan's court of the county of Essex, returnable to the term of June, A. D. 1831, requiring them to exhibit their accounts; in obedience to which they filed separate accounts; and in the term of September then next, upon notice by them given for that purpose, they filed their final accounts as executors as aforesaid; to which accounts the complainant excepted in divers particulars, and the said exceptions are still pending undetermined. By the accounts so filed, there appeared a net balance, after the payment of all charges and commissions, in the hands of Brant Van Blarcom, one of the said executors, of three thousand five hundred and seventy-six dollars and sixty-five and a half cents; and in the hands of John W. Berry, the other of said executors, of three thousand and eighty dollars and seventy-five cents, in cash, and a bond for five hundred dollars, secured by mortgage, which remains uncollected, though considered good.

That the complainant hath given due notice of said assignments to the defendants, frequently applied to them and requested them to come to a full account with him of the said personal estate and of the proceeds of the sales of the real estate, and to pay over to him the clear surplus in their hands, to which he is enti-

tled by virtue of the said assignments, and also to assign to him all the bonds and other securities remaining uncollected; which they refuse to do.

The bill further charges, that the accounts filed by the said executors in the surrogate's office of the county of Essex, are in many respects unjust and untrue; that there are divers mistakes, omissions and improper charges therein, to the prejudice of the complainant; that neither of the said executors hath charged himself with all the interest which have grown due, nor with all the rents of the real estate received by them. That they have charged themselves with no interest upon moneys of the estate received by them, and mingled with their individual funds, and used in their business; nor have they charged themselves with certain moneys deposited in bank in the life-time of the testator, and received by the said executors, nor with the interest accrued thereon.

The bill further states, that on the 10th day of December, A. D. 1830, the complainant, by his attorney, informed Brant Van Blarcom, one of the said executors, that powers of attorney had been forwarded for a part of the said legacies, and that if any of the moneys belonging to said estate were in jeopardy in the hands of his co-executor, that he was authorized to call upon him for security, and under certain circumstances to institute an action for the recovery of moneys in his hands; and that if the said Brant Van Blarcom neglected his duty in this respect, he would be held liable for all moneys lost through his co-executor. Insists that it was the duty of the said Brant Van Blarcom to see that all moneys that passed into the hands of his co-executor were properly secured; and that the complainant ought not to be subject to any loss by reason of the inability of the said John W. Berry to pay over the moneys of the estate received by him, but that the said Brant Van Blarcom ought to respond therefor.

The bill further charges, that the said executors have used the funds belonging to the said estate in their own private business, without any order of the orphan's court for that purpose, and without any security whatever being given or provided for the payment thereof. That the said John W. Berry is engaged

in an extensive manufacturing business in Paterson; that within two years the establishment with which he is connected has been very much embarrassed, and partially closed its business. That the said John W. Berry has disposed of a farm near Paterson, which he owned at the death of the testator, and that he is not now seized of any real estate in his own right, to the knowledge or belief of the complainant. That the estate of testator is not safe in the hands of said executors; and that they ought immediately to pay the same into the hands of a receiver to be appointed by the court, or into court, to be invested and disposed of under the order of the court, for the benefit of the complainant and others interested therein.

The bill further charges, that one C. B. Z. was indebted to the testator in a large sum of money, upon a bond secured by mortgage on a house and lot in the village of Aquackenonk; upon which the said executors, on the 21st day of January, 1830, obtained a decree for the foreclosure and sale of the mortgaged premises to pay and satisfy the sum of nine hundred and thirty-eight dollars and eighty-one cents, with seventy-one dollars and twenty-two cents costs. That in pursuance of said decree the mortgaged premises were exposed to sale, and on the 7th day of June, 1830, were struck off to one H. W. for seven hundred and sixty dollars, leaving a large balance of the mortgage debt unpaid, and which the mortgagor is unable to pay, and for which the said John W. Berry prays an allowance in his account as executor; that the premises were struck off to the said H. W. for the benefit of the said John W. Berry, who advanced the money required to be paid at the time of the sale, and that no deed has ever been delivered for the said premises, but that the said John W. Berry is authorized to take the said deed for his own benefit. That the premises at the time of the sale were worth the amount due on the mortgage, and that no allowance should be made to the executors for the pretended deficiency.

The bill prays an account; that interest be charged upon all moneys in the hands of the executors, and that the defendants may be decreed to pay to the complainant such sums as upon

such account shall appear due to him; and that in the mean time, the amounts severally admitted by the defendants to be in their hands, may be secured under the direction of the court, for the benefit of the parties interested therein; and that John W. Berry, one of the said executors, may be restrained by injunction from receiving any further part of the said estate.

Separate answers were filed by the defendants, and the cause came on for hearing upon the bill, answers, replication and proofs.

E. B. D. Ogden and *G. Wood*, for complainant.

E. Vanarsdale, for defendants.

Cases cited by complainant's counsel. *Toller on Ex.* 480–1; 1 *Bro. C. C.* 359; 1 *Vesey*, 294; 13 *Vesey*, 402; 1 *Serg. and R.* 241; *Griffith's Treat.* 193; *Rev. L.* 779; 1 *John. Chan. R.* 369, 527, 510, 624, 629; 4 *Ibid*, 303; 1 *Binney*, 199; *Chitty on B.* 10, 14; 2 *Atk.* 235; 8 *Wheaton*, 456–8.

Cases cited by defendants' counsel. 1 *Vesey*, 205; 1 *John. Chan. R.* 153; *Toller*, 482; 1 *Stark. Ev.* 335; 19 *Vesey*, 125; 4 *John. R.* 53; 1 *John. Chan. R.* 156; 1 *Pickering*, 81; 9 *Wheaton*, 532; 1 *Paine*, 620.

THE CHANCELLOR. William Berry, late of Paterson, Essex county, died in 1826, leaving a considerable real and personal estate, and leaving a last will and testament, of which he had constituted the defendants executors. They proved the will, and possessed themselves of the real and personal estate, to the amount of several thousand dollars. By the will, the testator gave to Robert Fields one hundred dollars. He then gave all his estate to his brothers, Daniel and John Berry; his late wife's brothers, William, John and James Sumpter; his nephew, Jonathan Berry, son of James Berry, deceased; John Sumpter and James Sumpter, sons of John Sumpter, deceased—in equal

shares; subject to the payment of certain legacies, viz.: to the four daughters of his late brother, Samuel Berry, deceased, twenty-five dollars each; to Mary, the daughter of his late brother, James Berry, deceased, and to the daughter of his late brother, David Berry, deceased, fifty dollars each; and to Nancy Chorton, twenty-five dollars. All the legatees reside in England, and this suit is brought by Walter King, who claims as an assignee for a valuable consideration, the right and interest of all of them except Robert Fields and Nancy Chorton.

The complainant charges in his bill, that the defendants neglected to render an account of the estate, until required by a citation from the orphan's court of the county of Essex. That they rendered separate and final accounts in 1831, which accounts are erroneous in divers particulars. That they have not charged themselves with the whole amount of the estate that came to their hands, nor with all the interest that accrued on it. He prays, among other things, for an account to be taken in this court, and that the defendants may be decreed to pay to him what, upon taking such account, shall be found justly due him.

The defendants do not admit the legality of the claim, but call on the complainant to establish it to the satisfaction of the court. They deny all charges of malfeasance, and insist that they are not bound to account for more interest than they have severally charged themselves with in their accounts as filed in the orphan's court; which accounts they allege to be correct, after excepting two errors, which they have particularized in their answers. And they assert their willingness to pay over the moneys to the person or persons legally entitled to receive it, under the direction of the court.

The first matter to be settled, is the right of the complainant to recover, and to recover in this suit as he has brought it, and as it is now presented to the court. The amount of the recovery, and the principles on which the executors are to be charged, are subjects that may claim our consideration hereafter.

The complainant is not a legatee himself. His rights are all derived from the assignments, and he must make it out, that the

persons who have executed the assignments are the persons named in the will as the legatees. This he has done with sufficient certainty. Peter Berry, one of the witnesses, was a nephew of the testator. He came to this country from England about ten years ago, and was acquainted with all the legatees, whose interests are claimed by the complainant. He testifies to their existence at that time, and to the places where they lived. He does not fully prove the hand-writing of the assignors, so as perfectly to identify them in that way, and this is not indispensable. The persons who have signed the instruments are persons of the same name, all known to the subscribing witnesses, and therefore not fictitious; all, with a single exception, residing in the places mentioned by the witness; and in the absence of all proof, or even reasonable presumption to the contrary, it is not to be supposed that a deception has been practised, and that these persons are other or different from those who are named as legatees. So gross and extensive a fraud is not within the compass of probability, if it be at all possible.

The complainant is next bound to show a valid and sufficient assignment. There can be no question as to the form as well as the substance of the instruments. They are sufficient to pass the entire interest of the legatees. The consideration appears to be small, compared with the amount of the property; but if the parties were capable to contract and make the conveyance, they can scarcely hope to invalidate their own deeds, on the ground that they have made a disadvantageous contract. The executors have no concern with the amount paid for the shares by the purchaser. They are not to be the judges of its reasonableness or sufficiency. And if they pay according to the direction of the assignments, it is not perceived that the act can be called in question, or that they can be placed in any jeopardy.

The complainant is also bound to present his case properly before the court; in other words, he must bring in all proper parties who have interests that may be affected by the decree, so that the decree may settle the rights of all. It is objected in this case, that the legatees themselves are not parties, and of course will

not be bound by any decree that may be made. Is it necessary that they should be parties? If it is, the objection is not too late, and the cause must stand over until they can be brought in. The general rule is as has been stated—that all persons either legally or beneficially interested in the subject matter and result of a suit, must be made parties: *Coop. Eq. Pl.* 34. And in some instances, where the whole beneficial interest was in one person, and nothing but a naked legal right left remaining in the other, the court has been strict in enforcing the rule. Thus, when a bill was filed by the assignee of a judgment, to receive the rents and profits of lands bound by the judgment, the court decided that the assignor should have been made a party—he having the legal title, and the complainant having only an equitable right: *Cathcart* v. *Lewis*, 1 *Ves. jr.* 463. So in *Ray* v. *Fenwick*, 3 *Bro. C. C.* 25, the assignee of a bond filed a bill for a *ne exeat* against the obligor; and lord Thurlow refused to order the writ, and dismissed the suit, because the representative of the assignor was not made a party. It is to be observed, however, that judgments and bonds are choses in action of a strictly legal character. According to the common law, the legal right could not be divested in any way by assignment or transfer. All that could be passed was an equitable right, or what is commonly called a beneficial interest; and the holder of this interest could not cancel the judgment, nor in any way affect the strict legal right of the assignor. Hence, if a suit in equity was brought against the beneficial holder, it was necessary to bring in the holder of the legal title. His interest was considered as separate, distinct and existing, and if not brought in, the decree would be inconclusive, and no protection to the defendant.

But the rule has not been uniform. In *Brace* v. *Harrington*, (which was the case of a bond,) 2 *Atk.* 235, lord Hardwicke said it was not necessary in every case of assignment, where all the equitable interest is assigned over, to make a person who has the legal interest a party. In that case the bond sought to be recovered had lain in the hands of the assignee, twenty-two years after the assignment, without any demand having been made. It was

calculated to excite doubt and suspicion, and for that reason the cause was ordered to stand over for the representative of the assignor to be made a party; for it is possible, says the court, that the assignor may have been paid, and it is therefore necessary to have an answer as to that particular, either from him or his representative.

It would seem from this, that the practice of the court has not been entirely uniform on this subject; and indeed, according to some modern authorities, the question of necessary parties is always more or less a matter of discretion, depending on convenience: *Ex'rs of Brasher* v. *Van Cortlandt*, 2 *John. Chan. R.* 245; *Wendell* v. *Van Rensselaer*, 1 *John. Chan. R.* 350.

The ground for making the assignor of a right or chose in action a party is, that he has, notwithstanding the transfer, a distinct and subsisting right, not capable of being assigned over, and that can only be extinguished by a decree of this court. Where the reason of the thing does not apply, the rule ceases. Hence bankrupts are not made parties to suits brought either by or against the assignees; their whole right, legal and equitable, being vested in the assignees by statute: *Coop. Eq.* 27; 3 *P. W.* 311; *De Golls* v. *Ward*, in notes. Now if, in the present case, the whole interest and right of the legatees vested in the assignee, the complainant, by the assignment, the assignors need not, and ought not, to be parties to the bill. They were legatees under a will. Their rights were not common law rights. Originally they appertained to the spiritual courts, and were dealt with according to the course of the civil law. For a long series of years legacies have been suable in the court of chancery; and that court has now, if it has not always had, a concurrent jurisdiction with the spiritual court. That they may now be sued for in the common law courts, by the statute, does not alter their essential character. They do not change their nature to suit the law of the court—but the court changes its law, and accommodates itself to their peculiar character. When suits for legacies were first prosecuted in courts of chancery, they

were obliged to adopt the law of the spiritual forums; and so it has been with the courts of common law: 3 *Ridg. P. C.* 243.

The character of the right, then, is not altered by making it cognizable, under certain circumstances, in the common law courts. It remains essentially an equitable interest. It is not barred by the statute of limitation; at least, such was the law, and such it is still in England. I am aware that chancellor Kent, in one of his last cases, held, that since a remedy at law was given here by statute to recover legacies and distributative shares, the statute of limitations would be a good bar to a suit for a legacy, even in equity: *Kane* v. *Bloodgood*, 7 *John. Chan. R.* 90. This was going further than had ever been adventured before, and overturned a number of his previous decisions. But if the principle should be adopted as expedient for the quieting of controversy, I do not think the essential and original character of a legacy would be so changed, as that, after the assignment of it by the legatee, a strict legal right would still be left in the assignor.

The claim to a legacy is essentially an equitable, and not a legal claim. That it is an assignable interest, cannot be doubted; and the assignment, if it passes any thing, must pass the whole right of the assignor.

I am of opinion, therefore, that, the assignments being legal and sufficient, it was not necessary to make the assignors parties to this suit.

As to the difficulty suggested by the defendants' counsel, that the subject matter of this suit, so far as an account is required, is now litigating in another tribunal, and that the defendants are liable to be disturbed in another court, it can present no serious obstacle to the progress of this suit. The orphan's court and the court of chancery have, to a certain extent, in reference to the accounts of executors, administrators and guardians, concurrent jurisdiction; but in all cases where a party seeks relief on grounds peculiarly of chancery jurisdiction, and which call for the exercise of chancery powers, the jurisdiction of this court is paramount. Here the complainant seeks not only for an account,

but to compel the executors to give security; to restrain them from the further calling in or receiving certain portions of the estate; and to have a receiver appointed, if need be. All these matters belong specially to this court. If a decree is made here, the court will take care that the party is not harassed in the other tribunal.

The complainant, then, is entitled to recover upon the case he has exhibited. The amount must be ascertained according to the usual course and practice of the court. There must be a reference to a master, to take and state an account upon proper and equitable principles. The complainant has stated fully his views on the subject, and especially as it regards the amount of interest with which he considers the defendants chargeable; and prays that the court would now settle the principles on which certain parts of the account should be stated. But without the accounts before me, and without the benefit of the testimony that must be taken in the investigation of the claim, I feel unable to give any satisfactory directions. The leading principles of the court establishing and regulating the responsibilities and duties of executors and trustees, are generally known. Their application depends entirely upon the facts of each case. If the report of the master is not satisfactory, it can be re-examined and corrected, if need be, by the court, on exceptions taken.

When the account shall have been taken and settled, and before a final decree is made in the cause, it will be a proper time for the court to consider the claim of the defendants to protection or indemnity of some kind. They ought not to be left in jeopardy; and the court will feel disposed to secure them in any way not inconsistent with the rights of the complainant, or its own duty and practice.

Let it be referred to a master to take an account, &c.

JACOB PARKER v. JOHN STEVENS et al.

A mortgagee who has assigned his mortgage by an instrument not under seal, and in whom the legal title to the mortgaged premises still remains, is not a necessary party to a bill of foreclosure filed by the assignee.*

It seems that the rule requiring all the parties in interest to be before the court, is to be regarded rather as a rule of convenience; and where the legal right is entirely technical, and no beneficial purpose can be answered by enforcing the rule, it will not be followed.

BILL for foreclosure, filed 30th August, 1832. Answer by John Stevens, the mortgagor, one of the defendants, admitting the mortgage, but setting up payment as a defence. A decree pro confesso was taken against Hetfield, the other defendant, who was a second mortgagee. The cause was heard upon the bill, answer, replication and proofs.

F. B. Chetwood, for complainant.

S. Scudder, for defendant.

THE CHANCELLOR. The bond and mortgage on which this suit is brought, bears date the 23d December, 1796, and were given by John Stevens to Oliver Martin, to secure the payment of one hundred and ten pounds. On the 23d day of November, 1799, Martin assigned the mortgage to Joseph Shotwell, by an endorsement on the back of it, in the words and figures following:—"For value received, I assign this mortgage to Joseph Shotwell, his heirs and assigns. Witness my hand, this 23d day of 11th month, 1799." Signed, Oliver Martin—witness present, John Pearce. He also assigned the bond by an endorsement on the back of it, in the words and figures following:—"For value received, I assign all my right to the within bond to Joseph Shotwell, his heirs and assigns, and engage to be ac-

* See *Bruen* v. *Crane*, ante, vol. i. page 347; *Story's Eq. Pleading*, 147, sec. 153, 148, note 1.

countable for the payment thereof;—as witness my hand, this 23d day of the 11th month, 1799. OLIVER MARTIN.

"Witness present—JOHN PEARCE."

On the 7th of March, 1832, the executors of Joseph Shotwell, by regular assignment, under hand and seal, transferred the mortgage to the complainant, who now brings suit against Stevens, the mortgagor, and Hetfield, who is a second mortgagee.

The defendant, Stevens, has answered the bill; and he insists, in his answer, that about the year 1798 or 1799, he built a saw-mill for the mortgagee, Oliver Martin, for which he was entitled to receive one hundred dollars: that he was, by their mutual agreement, to have credit for that amount on the mortgage, and he expected it was so credited, and knew not to the contrary until after the bond and mortgage were assigned to the present complainant. He alleges, that by giving this credit on the bond, it is not only paid, but more than paid.

There are several difficulties in the way of this defence. The first is, that the defendant has in no way proved the agreement set up in the answer, that the amount due for the work was to be credited on the mortgage as so much money paid. It is sufficiently proved that work was done; and it is reasonable, from the evidence, to presume, that the worth of it was about one hundred dollars; but whether it was paid for at the time, or what arrangement was made by the parties in relation to it, is not ascertained. The answer of the defendant cannot be received as evidence, and without it there is nothing to guide the court.

But aside from these legal objections, there is a difficulty in point of fact, that has not, as it appears to me, been overcome. The defendant has repeatedly, by his own acts, acknowledged the bond to be unpaid.

The bond was dated in 1796, and payable in 1798, without interest. According to the receipts, it appears that in 1799 the defendant paid at one time fifty-three pounds and ten shillings, and at another four pounds and eleven shillings. In 1805, after the assignment to Shotwell, he paid him twenty-eight pounds. Now the mill was built in 1798 or 1799. If the one hundred

dollars for building it, be credited as of that time, according to the defendant's claim, then it is a matter of plain calculation, that when he made the payment of twenty-eight pounds in 1805, he overpaid the bond about two dollars; and yet, since that time, he has paid one hundred and fifty-two dollars upon it at different times. It is very difficult to conceive this to be the result of *mistake* entirely, unless coupled with great ignorance. But it does not appear that Stevens was an ignorant man. The plain and regular hand with which his name is written to the bond and mortgage, proves the reverse. He must have had some knowledge of figures and accounts; and under existing circumstances, in the absence of proof, it is more rational to conclude that the work was paid for in some way at the time, than that the defendant should neglect to take up his bond in 1805, when, according to his own statement, it must have been paid off, and afterwards keep paying on it, at different times, from 1805 to 1822, making a sum, in the whole, of more than one hundred and fifty dollars.

Taking these objections together, they appear to the court conclusive against the defence of payment set up by the defendant, Stevens.

Another difficulty is interposed by the defendant, not going to the merits, but to the mode of proceeding. He insists, that as Martin, the original mortgagee, did not assign the mortgage under his hand *and seal*, to Shotwell, the legal interest never passed, but is still in Martin; and therefore, that he should be a party to the bill.

The general rule in this court is, that all parties in interest should be before the court, so that a decree made may cover the whole case, and do perfect justice. Hence "the assignors of judgments and bonds should be made parties, they having a legal right which no assignment can transfer:" 1 *Vesey*, 463; 2 *Atk.* 235. Where choses in action are strictly of a legal character, the propriety of the rule is obvious, but even in such cases it is not strictly enforced. The legal right may be so entirely technical and unimportant as to warrant the court in pass-

ing it by, where its observance would be attended with great inconvenience, and answer no single beneficial purpose. In the case from *Atkyns*, the court said the rule was not uniform; but it was enforced in that case, because it was important to the rights of the defendant to have the answer of the assignor, and on that ground alone.*

In New-York it has been considered rather a rule of convenience, and when no beneficial interests are concerned or affected, it is not followed: *Wendell* v. *Van Rensselaer*, 1 *John. Chan. R.* 349; *Ex'rs of Brasher* v. *Van Cortlandt*, 2 *John. Chan. R.* 247.

It appears to the court, that in this case the proceeding would be wholly useless, and attended with great inconvenience and expense. The mortgage was assigned and delivered more than twenty-eight years ago. The assignees have been in possession of it ever since, receiving payments and enjoying all the beneficial interest of the property. According to the defendant's answer, the assignor, after making the assignment, became insolvent, and as many as fifteen or twenty years ago went to the western country, and has since died. What benefit, then, could it be to the defendant to stay these proceedings, until search could be made for the heirs? Their answer could give no relief to him; and if the mortgage money is paid under the decree of this court, and the mortgage cancelled, they can have no rights against him. The complainant is entitled to a decree.

* "It has been laid down in a book of very high authority, that if a bond or judgment be assigned, the assignor as well as the assignee must be a party, for the legal right remains in the assignor. But it may, perhaps, be doubted whether the doctrine is universally true. The true principle would seem to be, that in all cases where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is not doubted or denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the latter a party." *Story's Eq. Pl.* 147.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

JULY TERM, 1834.

WILLIAM P. ROBESON and JOHN P. B. MAXWELL v. JOHN HORNBAKER and JESSE BARBER.

Equity will not lend its aid to carry into effect an imperfect or doubtful agreement.

The general rule is, that every agreement of which there should be a specific performance, ought to be in writing, certain and fair in all its parts, and for adequate consideration.

The court will not refuse its decree for specific performance, merely because the agreement doth not state in what township, county, or state the lands agreed to be conveyed, lie, provided the description of the premises is not thereby rendered altogether indefinite.

Reasonable certainty in the description is all that is required; and it is not material in what way the requisite certainty is attained.

BILL for specific performance of the following agreement, made on the 23d of March, 1833:—"Article of agreement made between William P. Robeson and John P. B. Maxwell, of the first part, and John Hornbaker and Jesse Barber, of the other part, witnesseth—that the said party of the first part agrees to sell to the said Hornbaker and Barber, forty acres of land and the water-rights, exclusive of mines and minerals; the line to

commence at a corner to be made in the middle of the road and in the old straight line of Fenton and Lofter's surveys, and to run thence along said road to a certain stone on the west side of said road and south of another old road, and then to run from thence a westerly course, crossing the Brasscastle brook below where the small stream puts in from the meadow, and running on the south side of said creek out near where a certain stake is put up in the middle of the creek, so as to give the said party of the second part a chance of watering their cattle, &c. in case they should enclose said forty acres; and from said corner in the middle of the creek the line is to run a straight course, so as to intersect the old line of Fenton and Lofter's on the top of the hill near a large chesnut or rock-oak tree with large top, the most westerly tree of three large trees and the top leaning a little easterly, and from thence down said old line to the place of beginning. It is understood, in case there should turn out in running to be more than forty acres, then the line is not to go so far up the creek, and if there should be less, then the line is to run as follows: a corner to be made not more than two chains in the line running to the mountain from the corner in the creek, and to run up the creek and from thence in the same old course to the mountain, so as to make up forty acres strict measure: and for and in consideration of the same, the said Hornbaker and Barber agree to pay to the said party of the first part, upon their making a warrantee title, fifteen hundred dollars; one third down, and the other in two yearly payments, without interest; to be secured by bond and mortgage on the premises. It is understood that in case it is not convenient to pay the purchase money as it comes due, then if the interest is paid punctually the parties of the second part not to be pushed for the money under five or six years from this spring. It is understood that the mill is to be built on the said tract; but in case it is not built thereon, the payments are to be immediately due, or other satisfactory security to be given."

Demurrer by one of the defendants to part of the bill, assigning for cause of demurrer, "that the said supposed article of

agreement, note or memorandum thereof, doth not state in what township, county or state the lands intended or agreed to be conveyed thereby do lie."

The cause was heard upon the demurrer.

Maxwell, for complainants.

Morris, for defendants.

THE CHANCELLOR. The bill is for a specific performance of a contract for the sale of lands, entered into between the parties, in March, 1833. The complainants agreed in writing to sell to the defendants forty acres of land, including certain water-rights, on Brasscastle brook or creek, for the sum of fifteen hundred dollars. The bill sets out the land, and alleges that the complainants tendered a deed to the defendants according to the contract, and that, although they had taken possession of the property and cut wood and timber on it, they refused to accept the deed, and pay or secure to pay the money, according to the contract.

Hornbaker has answered, and admits the whole case. Barber has demurred to part of the bill, and answered to the residue. He assigns as cause of demurrer, "that the said supposed article of agreement, note or memorandum thereof, doth not state in what township, county or state the lands intended or agreed to be conveyed thereby, do lie." And the only question is, whether by reason of that omission, the description of the premises is so uncertain and vague, as to render the action of this court improper or inexpedient.

It is contended on the part of the demurrant, that as to the locality of the premises, the agreement is altogether indefinite; that it cannot be understood without calling in and relying upon the aid of parol testimony, which is not admissible under the statute of frauds; that an action could not be maintained on it in a court of law, and therefore a court of equity will not interfere.

This court will not lend its aid to carry into effect an imperfect or doubtful agreement. It is not obliged, as lord Hardwicke says, to decree every agreement entered into, though for valuable consideration, in strictness of law. Every agreement of which there should be a specific performance, ought to be in writing, certain and fair in all its parts, and for adequate consideration: *Underwood* v. *Hitchcox*, 1 *Vesey, sen.* 279. This is the general rule, and has usually governed in cases of this kind.*

I think, however, it would be too strict to bring the present case within it. The omission of the town or county will not necessarily render the description of the property altogether indefinite. It may be sufficiently defined in a variety of ways, without mentioning either. There are many places or streams that are so well known, as to form better marks of designation to property than the names of the county or township would furnish; and as the only object is reasonable certainty, it is not material in what way the certainty is attained.

The property is described in the article of agreement as forty acres of land, and the water-rights; the line to commence at a corner to be made in the middle of the road and in the old straight line of Fenton and Lofter's surveys, and to run thence along said road to a certain stone on the west side of said road, and south of another old road, and then to run from thence a westerly course, crossing the Brasscastle brook below where the small stream puts in from the meadow, and running on the south side of said creek out near where a certain stake is put up in the middle of the creek. There the corner is to be the middle of the

* But courts of equity will enforce the specific performance of a *parol* agreement, when it is fully set forth in the bill and confessed by the defendant's answer, though the contract be required by the statute of frauds and perjuries to be in writing: *Attorney Gen.* v. *Day*, 1 *Vesey, sen.* 221; *Spurrier* v. *Fitzgerald*, 6 *Vesey*, 555; *Whitchurch* v. *Bevis*, 2 *Bro. C. C.* 566; *Cottington* v. *Fletcher*, 2 *Atkyns*, 156; 1 *Fonb. Eq.* 179, book i. ch. 3, s. 8; 2 *Story's Eq.* 57. Courts of equity will also enforce the specific performance within the statute of frauds and perjuries, where there has been a part performance of the parol agreement: 1 *Fonb. Eq.* 181, 183, note *e*; 2 *Story's Eq.* 62.

creek, so as to give the said party of the second part a chance of watering their cattle, &c. in case they should enclose the said forty acres. And from said corner in the middle of the creek, the line is to run a straight course so as to intersect the old line of Fenton and Lofter's, on the top of the hill near a large chesnut or rock-oak tree with large top, the most westerly tree of three large trees, and the top leaning a little easterly, and from thence down said old line to the place of beginning.

In this description there is as a guide, in the first place, the Brasscastle brook, which is a stream well known in that part of the country where the parties reside. It is evident from the agreement, that it is a water-course commanding a good head of water. It is a natural object about which there can be no dispute or mistake. Then, again, the line of the property intersects the old line of the Fenton and Lofter's surveys, and makes that line a part of its boundary. These ancient surveys are in many parts of the country as well understood and known as the lines of townships or counties. They constitute the most notorious and safe boundaries of property, especially wood land, as I take the present to be.

With these designations of locality in the description, (to say nothing of others,) I see no propriety in turning the party out of court on a demurrer. It should be a very gross case to justify such a course. The authorities do not warrant it. In 9 *Co.* 46—the earl of Shrewsbury's case—it was contended that the king's grant of the office of steward of the manors of Mansfield, Bolsover and Horseley, was void for uncertainty, because the county in which the manors were situated was not mentioned; for it was said, and so the truth was, that the king had divers manors of the same names in several counties; and it cannot be seen what manors he intended to grant; that the intent ought to appear in the grant, and not by collateral averment. But by the court, the grant is certain enough, though the county is omitted.

In *Jackson* v. *Clark and al.*, 7 *John. Rep.* 217, the property in the deed was distinguished as "Lot No. 1 of the smaller lots

into which Lot No. 3 of the subdivision of Lot No. 10 in the 12th general allotment of the patent of Kayaderosserus is subdivided, beginning at a hemlock tree," &c. and so bounding it by lots of different numbers adjoining it. It was objected to for uncertainty; and one objection was, that there was no town or county mentioned, which would be decisive of the situation. The court overruled the objection. See also *Blague* v. *Gold*, *Cro. Car.* 447, 473; 4 *Tyng's Mass. R.* 205; *Dyer*, 50.

In the case of *Barry* v. *Coombe*, 1 *Pet. U. S. Rep.* 640, the court decreed the specific performance of a contract much more uncertain and imperfect than the present one. Coombe made out a statement of an account between himself and Barry, consisting of various items, amounting to a large sum. In this statement he credits Barry as follows: "By my purchase of your half E. B. wharf and premises this day, as agreed on between us, $7,578 63." This paper was signed by Coombe, each party having a copy. On a bill filed for a specific performance, Barry set up the uncertainty of the agreement, and put himself upon the statute of frauds, as the defendant has done here. The court said, that for any thing that appeared on the face of the instrument, E. B. wharf may be as definitive a description of locality as F. street; and then the ambiguity could only arise if it be shown that the bargainor had more than one house in F. street, like the two manors of Dale, put in the old books.

Demurrer overruled.

NATHAN WOODEN and others v. ROBERT MORRIS and wife.

The agreement of a feme covert, with the assent of her husband, for the sale of her real estate, is absolutely void at law, and courts of equity never enforce such a contract against her.

Where husband and wife file a joint demurrer, it may be overruled as to the

husband and sustained as to the wife. It is not necessary that she put in a separate demurrer.

BILL for specific performance, filed June 12th, 1833. Demurrer by Morris and wife, the defendants, to the bill; assigning, among others, for cause of demurrer, that "it appears by the said bill of complaint, that the complainants seek to obtain the specific performance of an article of agreement, by the wife of the defendant, R. M., for the conveyance of the right of the said S. M. to certain real estate which descended to her from her father, or which was devised to her by her father, E. W., in the said bill named, and yet the said complainants do not show in and by their said bill, that the said S. M. acknowledged, on a private examination apart from her husband, before an officer authorized to take such acknowledgment, that she signed, sealed and delivered the said article of agreement as her voluntary act and deed, without any fear, threat or compulsion of her said husband."

The cause was heard upon the demurrer. The chancellor having been of counsel with one of the parties, called in George K. Drake, esquire, one of the masters of the court, to advise with him, &c. The demurrer was argued before the master.

Boice, for complainants.

W. Halsted, for defendants.

THE MASTER. The bill in this case was filed to procure the specific execution of a contract alleged to have been entered into by the defendants, together with other persons, under their hands and seals, to convey to the complainants certain lands in which the wife of Robert Morris had an estate, by devise, or descent, from her father. The complainants allege performance of the contract on their part, and also by all the other parties to the contract except the defendants. They, the defendants, have demurred to the bill, and rely especially on this ground, that Sarah Morris, the defendant, has not acknowledged on a private examination,

apart from her husband, before a competent officer, that she signed, sealed and delivered the said agreement freely, &c.

This ground of demurrer, so far as respects Sarah Morris, appears to be well taken, and should therefore be allowed. "The agreement of a feme covert, with the assent of her husband, for the sale of her real estate, is absolutely void at law, and the courts of equity never enforce such a contract against her:" 2 *Kent's Com.* 141; 5 *Day*, 496; 6 *Wendell*, 13; 2 *Jacob and Walker*, 412; 12 *Mad. Chan. Rep.* 261. And were this not the case, married women would derive but little protection from our act of assembly: *Rev. Laws*, 458, sec. 4.

But for aught that appears, the complainants have an equitable claim on the husband, and therefore he should answer; and, as respects him, the demurrer should be overruled.

A question was raised by the counsel for the complainants, in relation to the effect of the husband and wife having joined in a demurrer which is not good as to both. It is suggested that, in such case, it is bad as to both; and that, under such circumstances, they should not have joined, but that she should have put in her demurrer by her next friend. But I can see no good reason why the demurrer may not be overruled as to the husband, and sustained as to the wife; and such was the decision in the case of the *Mayor, &c. of London* v. *Levy*, 8 *Vesey, jun.* 404.

If the complainants should see cause to amend their bill, in this stage of the proceedings, they should be at liberty to do so on payment of costs.

Order accordingly.

CORNELIUS L. HARDENBURGH, JAMES S. NEVIUS, ABRAHAM SUYDAM, and others, v. The FARMERS AND MECHANICS' BANK OF NEW-BRUNSWICK, and others.

Upon application for an injunction, where notice is given, and the parties are heard upon the application, affidavits taken exparte, and without notice, may be read upon the hearing.

If the bill be filed, the defendant may put in an answer, and use the answer on the hearing, not as an answer, but as an affidavit.

Where the first election of directors of a bank is authorized to be held upon a call made by commissioners appointed by the act, it is not essential that the call should be the result of any formal order of the commissioners.

Where the original notice is in the hand-writing of the secretary of the commissioners, he being one of them, and the names of the other commissioners are signed by him, if the notice is published and in no way disavowed by the commissioners, it will be deemed their act.

After the organization of the company by the stockholders, the powers of the commissioners are at an end.

The commissioners cannot, after having advertised a meeting of the subscribers for the choice of officers, as specified in the act, adjourn or postpone the election at their pleasure.

The subscribers acquire under the notice a right to hold the election at the time appointed, and to come into possession of the property they have invested, and as a general rule, the commissioners have, after that, no right to interfere against the will of the subscribers.

If the commissioners, after calling a meeting of the subscribers, order the election postponed, and the subscribers, nevertheless, refuse to postpone, and proceed with the election; the election will not be thereby avoided, unless in the opinion of the court a postponement was clearly necessary.

But if any considerable number of subscribers had been deprived of their elective franchise in consequence of the postponement, would the election be avoided?—*Quere.*

The commissioners have a right to the custody of the money paid into their hands; but if their treasurer wrongfully withhold it from them, that is no ground for postponing an election by the stockholders.

The court cannot set aside an election for a mere irregularity, nor because the expenses of the commissioners were not paid.

To authorize an injunction to prevent an instalment being paid in, the court ought to be satisfied that the election was entirely without authority, and void.

THE bill in this cause was exhibited on behalf of the receivers and certain of the stockholders of the Farmers and Mechanics'

Bank of New-Brunswick; praying, among other things, that the president and directors of the said company be restrained by injunction from calling in or receiving an instalment of the capital stock of said company, and from declaring the first instalment forfeited in case of non-payment, and also from calling in any other instalment until the further order of the court. Upon exhibiting the bill, the chancellor directed notice of the application to be given, and a copy of the bill to be served on the defendants. The cause came on for hearing, pursuant to notice, on the 6th day of July, 1834, upon the bill, and *exparte* affidavits on the part of the defendants, the bill not having been previously filed. The nature of the bill is fully stated in the opinion of the chancellor.

C. L. Hardenburgh and *Wall*, for complainants, in support of the motion.

Scott and *I. H. Williamson*, contra.

THE CHANCELLOR. On the twenty-fifth of February last, the legislature passed an act to incorporate the Farmers and Mechanics' Bank of New-Brunswick, with a capital of one hundred thousand dollars, and liberty to increase it to two hundred thousand dollars. The sum of fifty thousand dollars was to be subscribed and actually paid in, before the bank should commence business. Twelve commissioners were appointed to receive subscriptions for the stock, and the sums subscribed were directed to be paid in the following manner, viz.: five dollars on each share at the time of subscribing, to the commissioners; and the remainder in such instalments, and at such times, as the president and directors should appoint. The commissioners, or any seven of them, were authorized, as soon as two thousand shares should be subscribed, to call a meeting of the subscribers at New-Brunswick, by giving at least three weeks previous notice in the newspapers printed in that city; at which meeting the subscribers should choose from among themselves eleven directors, to serve

until the second Monday in May, 1835, and that the said directors should choose from their own number, one to serve as president.

The bill presented in this case, states, that two of the commissioners declined acting; that eight of the remaining ten met in the city of New-Brunswick, on the 4th of March, 1834, and organized themselves into a board for the purpose of performing the duties and executing the powers given them by the said act. Cornelius L. Hardenburgh was appointed chairman, and Littleton Kirkpatrick secretary. And the board, at a meeting held on the 8th day of March, ordered that books of subscription for the capital stock of said bank, should be opened on the first Wednesday in April then next, and remain open for ten days in succession, unless the whole amount of the capital stock should be sooner subscribed. Of this order due notice was given in the public newspapers of the city. The board again met on the first day of April, and then ordered that any person subscribing to the capital stock of the corporation, should, at the time of subscribing, pay five dollars on each share subscribed for. They appointed five of their number a committee to receive subscriptions, and also appointed David Mercereau their treasurer to receive the moneys which should be paid by the persons subscribing. The books of subscription were opened at the time appointed, and were kept open for ten days; during which time there were subscribed two thousand seven hundred and sixty shares. Each person at the time of subscribing, paid into the hands of the treasurer five dollars on each share, amounting to thirteen thousand eight hundred dollars, which the said treasurer received from the board of commissioners as their treasurer, and for the commissioners. The board met again on the 12th day of April, at which time the chairman of the board reported that the books had been opened pursuant to notice; that two thousand seven hundred and sixty shares of the capital stock had been subscribed, and that the subscription money which had been paid, amounting to thirteen thousand eight hundred dollars, was in the hands of the said treasurer, subject to the order of the board. And thereupon, a committee of three was appointed,

whose duty it was made, in connexion with the treasurer, to take charge of the said subscription money, and deposit the same in the State Bank at New-Brunswick, and take a certificate of such deposite. On the third of May the commissioners again met, and the committee last mentioned reported that they had called at the residence of the treasurer, and did not find him at home, and that he afterwards informed the chairman of the committee that he had deposited the money in a bank of the city of New-York. On the 16th of April, a notice was published in the newspapers of the city, that a meeting of the subscribers would be held on Tuesday the 8th day of May, at 10 o'clock, A. M. to choose directors to manage the concerns of the institution. The notice appeared with the names of all the commissioners affixed to it, but was published without any previous meeting called, and without authority from any seven of them. At the meeting of the 3d of May, above mentioned, the board, after hearing the report of their committee, appointed with the treasurer to deposit the subscription money in the State Bank, that the treasurer had deposited the said money in a bank in New-York, and not knowing that the same was true, or in what bank the said deposit had been made, or whether the said moneys were subject to the order and control of the board of commissioners, made an order, that the treasurer produce before the board, on the 6th day of May then next, the said money, or a proper certificate that the same was deposited to the credit of the commissioners. On the said 6th day of May, the said commissioners met; and although the order of the 3d of May had been duly served on the said treasurer, he failed to appear; nor did he produce before the commissioners the said money, or any part thereof, or any certificate concerning the same. Under these circumstances, the board felt unwilling that an election for directors should take place, and being advised that the notice which had been given was illegal, and desirous of being better advised in the matter, they ordered the election for directors postponed to the 22d day of May. This order was published in the public newspapers in the city.

On the 16th day of May the board of commissioners met, and being of opinion that, under the sixth section of the act, the original call or notice for a meeting of subscribers to choose directors was illegal—the same not having been made by the board, or any seven of them, they came to the following resolution, viz.: "Whereas it appears to the commissioners, that the original order for holding the election for directors of the Farmers and Mechanics' Bank of New-Brunswick, was not made in accordance with the terms of the charter; and whereas the moneys paid by the subscribers to the treasurer, have not been placed under the control of the commissioners, pursuant to an order for that purpose; therefore, resolved, that the election for directors, which was postponed to the 22d instant, be further postponed indefinitely, and that public notice thereof be given in the newspapers of this city, by the publication of this order."

This resolution was published in one of the newspapers of the city; the publisher of the other paper omitted and neglected to publish it. Notwithstanding this resolution, certain of the subscribers met on the said 22d day of May, and chose eleven directors, all of whom save one accepted the appointment. These directors afterwards appointed James F. Randolph president, Lewis Carman cashier, and David Mercereau bookkeeper. Before the election was gone into, the electors, or a very large majority of them, were informed that the election had been postponed by the board of commissioners, for the reasons before mentioned, and they were requested not to proceed with the election until the treasurer had properly accounted for the moneys received by him.

The bill then charges, that the election was not in pursuance of the laws; that it was conducted without rightful power and authority, and was in violation of the vested rights and interests of the other subscribers, and contrary to equity and good conscience. It charges, that the voters had not the requisite certificates to qualify them as voters; and that the inspectors, after having closed the polls and adjourned, opened them to receive other votes, and that such other votes were actually received.

The bill further charges, that the said treasurer still detains the said sum of money from the commissioners, in violation of the trust under which he received it, and that those who voted at the election combined together to get the management and control of the institution, contrary to law, and the just rights and interests of the complainants.

It also states, that the president and directors have ordered an instalment of five dollars on each share subscribed for, to be paid on the ninth day of July, and that the expenses of the commissioners remain unpaid.

The bill prays, that the treasurer may be decreed to pay over the said money to the committee appointed with himself to receive and deposit it in the State Bank at New-Brunswick, or that the said treasurer may be decreed to deposit it there to the credit of the said commissioners, and to pay over to the secretary of the commissioners the sum of one hundred and fourteen dollars and thirteen and a half cents; that the election for directors may be set aside and decreed null and void; and further, that the president and directors be restrained, by the order and injunction of the court, from calling in the said instalment or receiving it, and from declaring the first instalment forfeited in case of non-payment; and also from calling in any other instalment until the further order of the court.

The application for an injunction was made to the chancellor at his chambers; but considering it rather special in its character, and one not of ordinary occurrence, it was directed that a copy of the bill should be served on the defendants, and notice given of an application at some future day. This was done, and the matter came on to be heard on Tuesday the eighth day of July instant.

Upon the hearing, the defendants offered to read sundry affidavits, touching some of the matters stated in the bill, taken exparte and without notice. Upon objection being made, the affidavits were ordered to be read, subject to the future opinion of the court. Before considering the case on its merits, it will be necessary to decide upon their admissibility. If this were

a new question, I should be strongly inclined to disallow them, upon the ground, that to permit affidavits to be taken as to particular matters charged in the bill, and taken exparte, might surprise the complainants, and either compel them to postpone their application for the purpose of procuring counter affidavits, or proceed to the hearing under great disadvantages. But I understand the question has been settled in this court, in favor of their admissibility. It is very certain that a practice has prevailed to a considerable extent, founded on the opinion that the law on the subject was settled; and I shall accordingly admit them, and also the documents exhibited. If the bill had been on file the defendants might have put in an answer to it, and used that on the argument, not as an answer, but as an affidavit. This has frequently been done, and in almost every case in which the court has directed a notice to be given of the application, and a copy of the bill to be served; or where such notice has been given without express direction, on the ground that the court, if applied to, would have given such direction, it has been usual for both parties to produce affidavits. It was done in the cases of *Weston* v. *the Camden and Amboy Railroad and Transportation Co.*, and *Scudder* v. *the Trenton and Delaware Falls Co.*, *Saxton*, 696; and although no objections were made, they were received on the ground that it was in accordance with the practice of the court.

It is understood that such is the practice in the state of New-York, but I do not find any adjudged case in which the question was distinctly raised. In *Beekman* v. *the Saratoga and Schenectady Railroad Co.*, 3 *Paige*, 45—which was an application for an injunction—the defendants produced affidavits and documents against the motion, and they were read and adverted to by the chancellor in his opinion. From this it may be inferred, that the practice in that court is the same as in our own.

The English mode of granting injunctions differs so widely from ours, that we can only receive aid from their practice by analogy. That analogy is in favor of what I consider to have

been the practice in New-Jersey: *Morphett* v. *Jones*, 19 *Ves.* 350; *Eden on Injunctions*, 236, and the cases there cited.

David Mercereau testifies that he was one of the commissioners, and as their treasurer received from the subscribers thirteen thousand eight hundred dollars, all of which, except three hundred dollars, he deposited in the Mechanics and Traders' Bank in New-York. Ten thousand dollars were deposited on the seventh of April, and three thousand five hundred dollars on the fourteenth of April. For these deposites he received certificates as treasurer of the commissioners. He states further, that on Tuesday the sixth of May, he exhibited these certificates to the persons composing the committee appointed to receive from him the money, as above stated. They severally expressed themselves perfectly satisfied. That one of them, in reply to a question whether he should hand over the certificates to the commissioners, told him he must not do so, but keep them himself. That being compelled to leave New-Brunswick at eight o'clock in the morning of the sixth of May, he could not meet with the commissioners that day. That the election for directors took place on the eighth of May, and two thousand two hundred votes were given. On the evening of the same day the directors met and organized, and all of them save one were sworn into office. They elected James F. Randolph president. On the same day, deponent transferred and delivered to the president and directors of said bank the above mentioned certificates, and Lewis Carman's duebill for two hundred dollars, and one hundred dollars in money, making in all thirteen thousand eight hundred dollars, and received therefor a full discharge from the said president and directors of the said bank.

D. Fitz Randolph proves the publication of a notice for an election on the eighth of May, for at least three weeks, in both the papers in the city.

James F. Randolph testifies, that the amount of thirteen thousand eight hundred dollars, received from the subscribers, was received by the president and directors from D. Mercereau, one of the commissioners, in the certificates, note and money, as above stated; and that he, as president of the bank, caused the

said certificates to be taken to the Mechanics and Traders' Bank in New-York, and surrendered, and the said sum of thirteen thousand five hundred dollars to be deposited in the bank last mentioned to the credit of the Farmers and Mechanics' Bank of New-Brunswick, on the ninth day of May; and that the same has ever since remained, and still does remain, in said bank; and that he retains, as president, the said duebill and the said one hundred dollars—the whole subject to the order and direction of the said Farmers and Mechanics' Bank of New-Brunswick; and that on the receipt of the said certificates, duebill and money, as aforesaid, from the said David Mercereau, he, by the direction of the board of directors of the bank, executed to the said David Mercereau a full and complete discharge therefor.

The affidavits of William Letson, Samuel Baker, and Lewis Carman, relate principally to the election, and the mode of conducting it, and will be adverted to hereafter, if need be.

The object of the present application is, that an injunction may issue to restrain the Farmers and Mechanics' Bank of New-Brunswick from calling in a second instalment on the capital stock subscribed. By the fourth section of the act of incorporation, five dollars on each share subscribed are directed to be paid to the commissioners at the time of subscribing, and the remainder in such instalments, and at such times, as the president and directors shall appoint. A call having been made for a second instalment, and the complainants alleging that it is made by persons having no right to make it—by a pretended corporation, having no legal existence—it becomes important to inquire, whether there has been in truth any lawful election of directors. This inquiry lies at the foundation of the whole case.

It appears by the bill itself, that the books for subscription were opened by the commissioners upon due notice, and that they remained open for the time prescribed by the act. More than two thousand shares were subscribed, and the sum of five dollars on each share actually paid by the subscribers to the commissioners at the time of subscribing. Upon this a meeting of the subscribers was called by the commissionors, and duly published, for

the eighth of May; and on that day a majority of the stockholders met and went into an election; and the persons now claiming to be directors, were elected by a large majority of votes.

But it is objected, that the election was without authority, and therefore void; and this upon several grounds.

And in the first place, it is alleged that there was in truth no order of the commissioners to call a meeting of the subscribers for the eighth of May, the day the election was held.

I think this objection cannot prevail. The election, it is true, was to be had on the call of the commissioners; but it was not essential that this call should be the result of any formal order of the commissioners. It is in evidence that the original notice given to the printer, is in the hand-writing of the secretary, he being one of the commissioners, and that with his own hand he signed the names of the other commissioners, including those who had not acted. It is not to be supposed that this was done without the knowledge and implied assent of the commissioners, or a majority of them; much less, that it was done against their will. The notice was published for three weeks in the papers of the city in or near which they all reside, and the act was in no way disavowed. It is reasonable to presume that, although no direct order to that effect was given, it was understood to be a matter of course, and the secretary, himself one of the commissioners, felt himself authorized to give the notice. Under such circumstances, and especially as the notice was not recalled, or in any way disowned by the commissioners, I deem it right to consider it their act.

If, however, there were doubts on the subject, they would be removed by the proceedings of the commissioners on the sixth of May, at a meeting held on that day, and when the subject was brought before them, as it must have been from the nature of the resolution then adopted. They did not disown the notice, and declare it void as not being the act of the commissioners, but they resolved to postpone the matter until the twenty-second of May. This postponement is a recognition of the propriety of the original notice. If the one was invalid and unlawful, the other must have

been equally so, and thus an election held on the twenty-second would also, upon the principle contended for, have been unlawful. This was not, and could not have been, the intention of the commissioners. Their object doubtless was, to have the election lawfully held on the day fixed in the order of postponement.

But it is again objected, that the election was unlawful and without authority, because, upon the day on which it was held, to wit, on the eighth of May, the commissioners, or a majority of them, at a regular meeting, and by a formal vote, resolved to postpone the meeting of the subscribers to the twenty-second of May; and in defiance of such postponement, the subscribers, or a majority of them, proceeded to hold an election, and to organize themselves into a company under the act of incorporation. This raises the question as to the rights, powers and duties of the commissioners.

In all our acts incorporating banks, commissioners are appointed to open books and receive subscriptions for the capital stock. They are agents for those who shall afterwards subscribe to the stock; and they have, in a certain sense, a trust to execute on behalf of the public. They are to see that the money to be paid at the time of subscribing, is actually paid and received in good faith. This is an important duty. It is important to the public, that the basis of our monied institutions should be money itself, and not credit; and it is important to bona fide stockholders, that their property should not be placed under the control of speculators. They are to act as other bodies act. The will of the majority must govern, and the act of the majority must be taken as the act of the whole. They have a right to meet and organize for the transaction of business, as was done by the commissioners in this case, appoint their secretary, treasurer, and if need be, their committees. In some cases, though not in this, they have the distribution of stock where there is an excess. When the requisite number of shares of the capital stock are subscribed, and the first instalment paid, they are authorized and required to call a meeting of the subscribers, that they may organize and take their own business in their own

hands. After such organization, the powers of the commissioners are at an end.

The call for the meeting of the subscribers on the eighth, we have already considered as proper. Had the commissioners a right to postpone to the twenty-second? I am unwilling to adopt the principle contended for at the bar, that after receiving the subscription, the office and functions of the commissioners cease entirely. They are the depositories of the subscription books, from which it is to be ascertained who are entitled to vote; and they hold the subscription money, which cannot properly be paid over until there is some lawful organization of the company. It seems reasonable, then, that they should exist as a body until they can be lawfully discharged from the responsibility of their trust. But I am equally unwilling to admit that the commissioners, after having advertised a meeting of the subscribers for the period specified in the act, can adjourn or postpone the same at their pleasure; for if so, they might entirely defeat the object of the act of incorporation. It would be going too far, perhaps, to say, that they may not do it in any case. Circumstances might occur, in which the exercise of such a power on the part of the commissioners would be indispensable. But I consider that, as soon as lawful notice is given of a meeting of subscribers for the choice of officers, the subscribers acquire rights under it. They acquire the right to hold the election at the time appointed, and to come into possession of the property they have invested; and as a general rule, the commissioners have after that no right to interfere against the will of the subscribers. The act does not confer on them any such power, nor does it speak of any thing to be done by them after calling the meeting. They are not required to attend at the election. If they do attend, there is no power committed to them. The election is not under their management or supervision. Inspectors are to be chosen, not by the commissioners, but by the subscribers themselves; and those inspectors superintend and direct the election. Neither the act under which they derive their authority, nor the reason of the thing, appears to contemplate such a power.

If the commissioners took upon themselves to exercise a power not specially granted, the rightful act of the subscribers in electing their officers ought not to be avoided, unless in the opinion of the court, a postponement was clearly necessary under the circumstances of the case. If no such necessity existed, the act of the commissioners, however well intended, was an excess of authority, and void.

Let us now inquire into some of the grounds assigned for the postponement, and see how far the measure was necessary for the protection of the interests of the commissioners, the subscribers, or the community.

The first and principal one is, that the treasurer of the commissioners had refused or neglected, when requested, to deposit the subscription money in the State Bank at New-Brunswick, pursuant to an order of the commissioners.

It is to be remembered, that the bill does not charge that the money was not actually paid by the subscribers, and received by the treasurer; on the contrary, these matters are distinctly alleged in the bill; and there is no charge that the money was not in the possession and under the contol of the treasurer. It is not charged that he lost, squandered or wasted it. But it appears, that on the twelfth day of April, after the subscriptions were received, a committee of three was appointed to take charge of the money, and with the treasurer deposit it in the State Bank at New-Brunswick. It was perfectly right for the commissioners to make such appointment, and take order in relation to the depositing of the money. The treasurer was their officer and agent. He received the money by their appointment, and for them, and as such treasurer, had no more right to detain it from their custody or control, than the committee appointed to receive subscriptions had to retain the books. The committee reported to the commissioners on the third of May, that they had called upon the treasurer, and were informed that he had deposited the money in a bank in the city of New-York. They then ordered that the treasurer should produce the money before the board on the sixth of May, or a certificate that the money was deposited to the credit

of the commissioners, or in default thereof that the election should be postponed. On the sixth of May, neither the money nor the certificate was produced; and the treasurer not appearing, they ordered the election of directors to be postponed to the twenty-second of the same month. The explanation given of the transaction by the treasurer is not very satisfactory, and must naturally have had a tendency to create suspicion in the minds of the commissioners; but it in some measure relieves the case as presented by the bill. Taken together, the amount is this: that one of the commissioners had the money in his own hands, as treasurer of the board; or rather, as such treasurer, had deposited it in a bank in the city of New-York; whereas the commissioners insisted that the money should be deposited in the State Bank at New-Brunswick. It is not alleged in the bill, that the money was not in truth deposited in the bank in New-York, or that it was unsafe there; but it was a contest between the commissioners and the treasurer, in regard to the custody of the money. I have already stated that the commissioners (I mean the majority of them) had a right to hold it as against their treasurer; and he erred in supposing he had a right to retain it. But I do not conceive that this was a sufficient ground for postponing the election, and thereby depriving the stockholders of the power of looking to their own concerns. Were they to be deprived of their franchise until this controversy was settled?—until it might be ascertained whether the treasurer, himself a commissioner, had a right to retain the money, notwithstanding the order of the commissioners that it should be paid to them or deposited to their order? I think not. It was not essential to their safety. Their claims upon the treasurer for the money were not impaired by the election. If the directors sought it at their hands, their right to compel the payment of it by the treasurer was a perfect right, and could be exercised as well after the election as before. Suppose the money in danger of being lost; would it have been right for the commissioners to take the matter under their own care, and by a temporary or indefinite postponement to preclude the stockholders from acting?

Nor was it essential to the interests of the subscribers or the public, that the election should be postponed. If it had been charged, or if there was ground to believe, that the treasurer had colluded with certain of the subscribers, to enable them to get control of the institution without the payment of money, and that the instalments had never been paid by them, it would have been important to the interests of the bona fide stockholders and the community, to inquire into the matter before the fraud was consummated. If the capital stock had not in fact been paid in, there should have been no election. But there is no such allegation; and the charges of combination and fraud that are made, as well as the circumstances adduced in support of them, are too general and indefinite for the court to act on, and of course could give to the commissioners no authority for the measure they adopted.

A third ground presented for the interference of the court is, that persons were allowed to vote at the election for directors, without having proper certificates, and that after the polls were closed, the inspectors opened them again to receive additional votes. In relation to these matters it is sufficient to say, that they are at most irregularities, and that the court cannot set aside an election for a mere irregularity.

Another ground taken at the bar is, that the expenses of the commissioners were not paid; but as the corporation is liable for them to the commissioners, I think it formed no ground to postpone the election; and I did not understand it to be relied on as sufficient in itself to authorize any action of the court.

So far, then, as the claims and rights of the commissioners, as such, are involved in this case, an injunction cannot be granted on the facts as now presented, upon the bill and affidavits.

Some of the complainants, however, are subscribers or stockholders; and they complain that the election was not in pursuance of law, and that those who voted combined together to get the management of the institution, contrary to their rights and interests.

If it appeared in point of fact, that any considerable number of subscribers had been deprived of their elective franchise, in consequence of the postponement; or that any fraud or concealment was practised; or that the officers elected had not been chosen by a majority of the whole number of votes; this branch of the case would have presented a serious difficulty. But it is not even alleged in the bill, that any one of the subscribers was prevented from voting by the postponement. There appears to have been no fraud or concealment practised; not a single illegal vote is alleged to have been taken. Out of two thousand seven hundred and sixty shares subscribed, two thousand two hundred were represented at the polls; and with few exceptions, the votes were all given to the persons elected. If the remaining subscribers voluntarily declined voting, under a misapprehension of their rights, it furnishes no sufficient ground to avoid the election, especially when it is evident their votes could not have varied the result.

Upon the whole case, it is the opinion of the court that the injunction prayed for ought not to issue. To authorize it, the court ought to be satisfied that the election was entirely without authority and void, and of course that there is no corporation in existence. Such is not the conviction of my mind from the circumstances presented to me by the bill and affidavits.

Having reached this conclusion, it is satisfactory to know that the claims of the complainants are not concluded by it. The injunction is only preliminary to the general relief sought. And if the suit be further prosecuted to obtain that relief, the court will always be ready to grant it when a proper case shall be presented. And on the other hand, it is equally satisfactory to learn from the affidavits read at the hearing, that the money which was in the hands of the treasurer of the commissioners, or the certificates of the deposite, have been paid or transferred to the bank; and that the amount is now on deposite, to the credit of the bank, and subject to its control.

The commissioners, who are the principal complainants in the case, as well in the course taken in regard to the election, as in

the filing of the present bill, have acted with commendable prudence, and a just regard to their own rights and responsibilities. If they erred in the construction of their powers, it is evident they were led into the error by a desire to secure themselves, and the interests of the stockholders, and the public; and after what had taken place, it was proper for them to come to this court and ask its judgment. They were invested with an important trust, and they are entitled to protection, and to a proper discharge. They are not now entitled to have the money paid back, so that they may pay it over to the directors themselves; but they are entitled to a certificate from the corporation, that the amount of the subscription money received by the commissioners has been received by the corporation, and that the commissioners as such are fully discharged.

The motion for an injunction is denied, but without costs.

GIDEON SCULL and NEWCOMB B. THOMPSON v. THOMAS REEVES, DANIEL B. REEVES, GEORGE W. GARRISON and others.

If a debtor execute an assignment under the statute of New-Jersey, for the benefit of his creditors, annex thereto an inventory of his property and a list of his creditors under oath, and deliver it to the assignee, who receives it, understanding its objects and effect; the act of the assignor is complete, and he is divested of his estate, although the deed were not acknowledged. A trust is created, and the beneficial interest vested in the creditors, the *cestui que trusts*, though they knew nothing of it.

There is no particular formality necessary to the acceptance of a trust. If a person actually consent, or if he go to the property and exercise any power or right over it, it may be considered an acceptance, and especially when the rights of third persons are interested.

It is not necessary that there should be an actual consent either in writing or by parol; acts fairly implying a consent are sufficient.

An assignee is at liberty to refuse to act: no man can be made a grantee against his will.

If one of two assignees refuses to act, the trust is not thereby destroyed, but

[Scull and Thompson v. Reeves et al.]

the whole estate vests in the other, and he alone is competent to execute the trust.

If the deed of assignment be executed and delivered, and the trust accepted, the trustee cannot, by surrendering or cancelling the deed, destroy the trust, or impair the rights of the *cestui que trusts*.

If the answer of one of the defendants is not full and satisfactory as to any one of the grounds of equity set up in the bill, the injunction cannot be dissolved.

Where transactions are charged involving fraud, either actual or constructive, and especially where direct interrogatories are put in relation to particular facts, the court cannot be satisfied with a general answer, or one in any way evasive.

BILL for injunction and relief, filed twenty-seventh February, 1834. The bill was exhibited by the complainants for and on behalf of themselves, as creditors of Thomas Reeves, and of all such other creditors of the said Thomas Reeves as should come in and contribute to the expense of the suit, or be otherwise entitled to avail themselves of its benefit. The nature of the bill, and the character of the relief sought, will be found stated in the opinion of the chancellor. On filing the bill an injunction issued to restrain the sheriff of the county of Salem, and the several judgment creditors of Thomas Reeves, from seizing or selling any of the trust property covered by the assignment specified in the bill. Answers were filed on the eighteenth of March, 1834, and notice given of an application to dissolve the injunction. The cause was heard at April term, upon the motion to dissolve, on bill and answer.

L. Q. C. Elmer and *Jeffers*, for defendants, in support of the motion.

Wall, for complainants, contra.

THE CHANCELLOR. The bill charges, that Thomas Reeves, of Salem, was indebted to the complainants on the eighteenth February last, in the sum of eleven hundred and ninety-seven dollars and forty-two cents, on a promissory note payable on the twenty-seventh

of March. On the seventeenth of February, Richard Moore entered up judgment against Reeves and one James W. Mulford, for sixteen hundred dollars, in the Salem pleas, and an execution was forthwith delivered to the sheriff of the county, directing him to levy and make thereon the sum of seven hundred and twenty-four dollars and sixteen cents of debt, and five dollars costs of suit. On the eighteenth of February, Thomas Reeves executed an assignment of all his real and personal property to his son, Daniel B. Reeves, and George W. Garrison, in trust for the benefit of his creditors, in pursuance of the act of 1820, and annexed to the assignment a schedule of his property and list of creditors, under oath, and duly acknowledged it. The deed of assignment was delivered on the same day to George W. Garrison, one of the assignees, who, as the complainants believe, was present at the time of the execution of it, and took it into his possession. On the same day, or the day after, he went to the house of Reeves, took possession of all his estate, real and personal, locked up his store and took the key into his possession, and exercised various other acts of ownership over the said property, evincing his acceptance of the trust, and drew up the notice required by the third section of the act respecting assignments, mailed the same in the post-office at Salem to be inserted in one of the newspapers in Philadelphia, and afterwards took the same out of the office.

After the acknowledgment and delivery of the said asssignment, and after Garrison had accepted of the trust, viz. on the eighteenth of February, and about *two hours* after the execution of the deed, Thomas Sinnickson entered up judgment in the Salem pleas against Reeves for four hundred dollars debt, besides costs, and sued out execution and delivered it to the sheriff.

On the nineteenth of February, Robert H. Van Mater entered up a judgment against Reeves for the sum of eight hundred dollars, and sued out an execution thereon. On the same day he entered up another judgment against Reeves, for seven hundred and forty dollars of debt, and sued out execution thereon.

The complainants then charge, that on the twentieth of the same month of February, Reeves, at the instance of Van Mater,

became desirous to destroy the assignment, and for that purpose procured Daniel B. Reeves, one of the said assignees, to execute an instrument in writing, renouncing the trust; and also procured George W. Garrison to return the deed of assignment to him, Reeves, and return to him the possession of the real and personal estate, which was accordingly done.

After this, to wit, on the twentieth and twenty-second of February, sundry creditors of the said Thomas Reeves, viz. Robert H. Van Mater, Stoughton and Belden, Morgan and Buck, Samuel C. Dunn, and Rhoda Mulford, entered up judgments against him, and issued executions, and placed them in the hands of the sheriff of the county of Salem.

The bill charges that the judgment creditors had knowledge of the execution and delivery of the assignment at the time of entering up their judgments, respectively; that the sheriff has taken possession of all the property, and threatens to advertise and sell the same, and apply the proceeds to pay and satisfy the executions; that the assignees refuse to carry into effect the trusts in the deed of assignment—Daniel B. Reeves refusing to accept or act in any way, and Garrison, though he accepted the trust, refusing now to act any further or to carry the same into effect.

The bill prays that the assignment, and the trusts therein contained, may be established and carried into execution under the direction of this court, and that the trustees may be decreed to execute the trusts according to the statute; or that they, or either of them, may be discharged therefrom, and that one of them may act, or a new assignee be appointed, to whom the trust estate shall be conveyed; and that the said judgments, so entered up after the execution and delivery of the said assignment, be decreed to be no lien on the said trust property; and that the estate may be applied, under the direction of the court, to the uses and purposes expressed in said assignment, for the equal benefit of all the creditors; that, if need be, a receiver may be appointed, and also an injunction issue to restrain the sheriff from selling under the executions.

[Scull and Thompson v. Reeves et al.]

An injunction was ordered on the twenty-seventh of February, since which the several defendants have answered.

Thomas Reeves states, that being unable to raise money to satisfy the first judgment and execution against him, his great object was to obtain time, believing that he could convert his property into money and turn it in the payment of his debts better than any other person or persons could do. Not fully understanding the nature and force of an assignment under the laws of New-Jersey, he was induced to believe that by making an assignment he would have a chance to turn himself so as to be able to sell his property and pay all his just debts. Under this impression he applied to George W. Garrison, and requested him to act as his assignee, to which he assented; and thereupon this defendant ordered an assignment to be drawn, constituting the said Garrison, and defendant's son, Daniel B. Reeves, his assignees; which assignment was executed in the presence of a subscribing witness, but was not acknowledged.

He further says, that he made a list of his property and of his creditors. This was in the evening of the eighteenth February, and George W. Garrison took possession of the assignment, Daniel B. Reeves not being present. He did not solicit Daniel to act, but concluded he would not refuse. Next morning, Garrison came to the store, and began to talk about shutting it up. This was unexpected to defendant. He did not contemplate such a course of proceeding; for he had that morning, before Garrison came, opened his store, sold some articles, and one of his creditors calling, he had delivered him articles to the amount of upwards of twenty dollars in payment of a debt. The store was shut up by order of Garrison, and Daniel B. Reeves held the key. Next morning they all met at Salem; and Daniel B. Reeves, one of the assignees, having declined accepting the trust, he was advised that the assignment had no legal force, and believing that he could make arrangements with his creditors to give him time, and that he had property enough to pay his debts, and could manage it better than the assignees or any other persons, he requested Garrison to deliver up the assignment to be

cancelled. He did deliver it up, and this defendant cancelled it.

He admits the several judgments and executions, and says, if he had been allowed to settle his affairs himself, and had obtained the time of one year, which doctor Van Mater and Stoughton and Belden agreed to give him, and which agreement he understood was assented to by Thomas Sinnickson, he has no doubt he could have paid all his just debts and would have had a large surplus. He insists that he had a legal right to cancel the assignment; that no estate passed by it, nor did it create any trust; that the assignment failed to take effect, and was cancelled without any fraud, collusion or combination with any person or persons; not with the design of affecting the complainants, or other creditors, but with a view of replacing things in the same condition they were in before the execution of the assignment.

George W. Garrison says, in his answer, that Reeves called on him on the eighteenth of February, and proposed an assignment. He consented to act as one of his assignees. The assignment was drawn and executed, but not acknowledged, and delivered to him the same evening. Schedules of property and debts were made out, sworn to, and annexed to the assignment. Next morning, the nineteenth, he went to the store. Daniel B. Reeves and Thomas Reeves were there. Thomas appeared to consider the assignment as an instrument to keep off his bond and other creditors from bringing suits, and enable him to make sale of his property himself. Defendant requested Daniel B. Reeves to lock up the store for the present, and proposed that he and his father should come to Salem the next morning. They all met at Salem, when Thomas Reeves, believing he could obtain time from his creditors and could pay all his debts without great sacrifice, and do better than the assignees could, requested defendant to give up the assignment to be cancelled. Daniel B. Reeves having declined acting, defendant was advised that in consequence thereof the assignment could not be carried into effect, and that he might lawfully deliver the said assignment; he accordingly did deliver it to the said Thomas Reeves, for the pur-

pose of having it cancelled. The defendant admits that he drew a notice for creditors, and it was withdrawn, and also that he requested Daniel B. Reeves to shut up the store. He admits, also, that he stated or mentioned that an assignment had been made to him and Daniel B. Reeves, and he informed some of the creditors of it; and that he requested that the goods sold by Reeves on the morning of the nineteenth, in satisfaction of a debt, should be returned.

Daniel B. Reeves, the other person named as assignee in the deed of assignment, says he was not consulted, or requested to act as assignee, nor did he consent in any manner to act; but at the request of Garrison he shut up the store and took the key. That on conversing with his father he found that he was under a misapprehension as to the legal effect of the instrument, and without any collusion with his father or any other person, declined accepting the trust. He never saw the deed, nor does he know of it except from information.

The answers of the judgment creditors will be adverted to hereafter, if it shall become necessary.

Upon this state of facts, it is insisted that the injunction should be dissolved. The principal ground taken is, that no assignment was actually made; that the property never passed out of Thomas Reeves so as to vest in the assignees, and of course that no rights vested in the complainants and other creditors as *cestui que trusts.*

The assignment appears to have been prepared under the act, entitled, "An act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors," passed the twenty-third of February, one thousand eight hundred and twenty. That act prescribes no particular mode in which such conveyances shall be made; and in the absence of any direction, we are to take it for granted that the usual formalities necessary to pass real and personal estate are to be observed. There must be a proper deed of conveyance, proper parties, and a due and proper execution. It must be signed, sealed and delivered.

[Scull and Thompson v. Reeves et al.]

In this case, Thomas Reeves proposed to make an assignment of his property. An execution had been issued against him, which at the time he was unable to meet, and he called on Garrison to be one of his assignees, with his son, Daniel B. Reeves. Garrison consented to act; and thereupon Reeves had the instrument prepared. He signed and sealed it; and after making out an inventory of his property and a list of his creditors, under oath, and annexing it to the deed, he delivered it to Garrison, who received it, understanding what the object and effect of it were. That it was not acknowledged is not material. Proof by the subscribing witness would have had the same effect, and such proof was not necessary to the validity of the act on the part of the grantor. It was only important in case it had been desirable to have the assignment recorded, and the act does not fix any specific time within which it must be recorded.

The act was then complete, so far as Thomas Reeves was concerned. He had done all that was needful for him to do, and so far as the divesting of the estate depended on his act, it was accomplished.

George W. Garrison, one of the assignees named in the deed, accepted the trust. His answer is full, or at least sufficiently so to justify that conclusion; but he insists, that as the other assignee renounced, he was advised that he was under no obligation to act, and delivered up the deed to be cancelled. How far he was correct in the conclusion, may be inquired into hereafter. It is necessary here to see whether Reeves, the other assignee, did or did not accept; and whether his renunciation was not at the instance of the assignor, and made expressly to defeat the assignment. The answer of Daniel B. Reeves is not as full and satisfactory as could be wished; and this is the more to be regretted, as the situation of the property and parties makes it important to settle the principles of the case upon this motive, if it can be done consistently. He states, that on the morning of the nineteenth, he was informed by George W. Garrison that his father had made an assignment, and appointed Garrison and himself assignees. Where he was informed of this; and whe-

ther, upon such information, he went to the store, or only happened there; or whether he lived there; and whether he knew, or had heard of the assignment from any other source, before that information given him by Garrison, does not appear. Garrison and he were at the store. They were there either as assignees, or persons about to enter upon their duties as assignees. Reeves knew that the assignment had been made; that Garrison and himself had been appointed assignees; that Garrison was there in that capacity, in virtue of the assignment. Did he then refuse to act? Not at all; but on the contrary he, at the request of Garrison, locked up the store, and put the key in his pocket. Why take this responsibility, if he intended to have nothing to do with the assignment?

There is no particular formality necessary to the acceptance of a trust. If a person actually consent, or go to the property and exercise any power or right over it, it may be considered an acceptance, and especially where the rights of third persons are interested. It is not necessary there should be an actual consent, either in writing or by parol; acts fairly implying a consent are sufficient. In respect of this matter, the answer of Reeves is not satisfactory, and does not fully answer the equity of the bill. He did certain acts, but he says he did not act in any manner as assignee; yet I think it plain that he appeared there as assignee. He went with his co-assignee; they took possession of the property in the store, and it was no longer in Thomas Reeves.

After this, as appears by the answer, the son seeing the father greatly dissatisfied, and very anxious to avoid the operation of the assignment, concluded not to accept, but to go to Salem and take advice; and upon advisement, he executed a renunciation.

It is charged expressly in the bill, that this renunciation was fraudulent; and Daniel B. Reeves was expressly required to answer on his oath, whether the renunciation was at the request or instance of the said Thomas Reeves, and designed and intended to defeat the trust. To this he says, that he declined the acceptance in consequence of the difficulties which he perceived would

be in his way, and without any *collusion* with his father or any other person. This is not a full and explicit answer. The defendant might well have renounced at the request of his father, and yet be under the impression that there was no collusion. Whether he did it at the instance or request of his father, he does not answer; nor has he paid any attention to the inquiry, whether the renunciation was designed and intended to defeat the trust.

The answer of this defendant not being full and satisfactory as to the acceptance of the trust, and as to the object, intent and reason of relinquishing or renouncing it; and the acceptance and subsequent fraudulent relinquishment being one of the grounds of equity set up in the bill—the injunction cannot be dissolved, even if there were no other grounds for retaining it.

But it is charged that the creditors, when they entered up their judgments, knew of the assignment; and that Reeves, the assignor, at the instigation of Van Mater, one of the judgment creditors, became desirous to destroy the validity of the assignment; and it is inquired whether the deed was delivered up at the request of said Van Mater, or any other of the judgment creditors, and which of them, and in their or either of their presence? Van Mater does not deny the fact of knowledge. It is true he absolutely denies any knowledge of the assignment except from hearsay. That was sufficient knowledge; and it is plain from the answer, though he neither expressly admits or denies it, that he understood that an assignment had been made at the time of entering up his judgments. Sinnickson says he heard a rumor that an assignment was about to be made, and therefore he hastened to get his judgment; but he does not answer the interrogatory, whether the deed was delivered up at his request as one of the creditors. There is not a word about it in his answer. This is singular, and the more so when it is seen by the answer of Thomas Reeves, that he believed, by cancelling the assignment, he could make an arrangement with his creditors to give him time; and he states further, that Van Mater and Stoughton and Belden, agreed to give him one year's time,

and he understood this agreement was assented to by Sinnickson. Van Mater denies that the assignment was delivered up at his instigation.

If there be any equity growing out of the fact that these judgment creditors knew of the assignment when they procured their judgments, then, it is admitted by Van Mater, or certainly not denied. If any equity growing out of the fact that the deed was delivered up at the request of the judgment creditors, or some of them, then Sinnickson has failed to deny that equity; for in his answer he says nothing on the subject. In these as well as in some other matters, the answers appear to be hastily and rather loosely drawn. And where transactions are charged involving fraud, either actual or constructive, and especially where direct interrogatories are put, in relation to particular facts, the court cannot be satisfied with a general answer, or one in any way evasive. It furnishes in this case an additional ground for retaining the injunction.

But grant, for the sake of argument, that there is no evidence of an acceptance on the part of Reeves, and that the delivering up of the assignment was without the instigation, advisement or knowledge of any of the judgment creditors; divest the case of all fraud, actual or implied—have the complainants no equity to sustain their injunction? Was there no trust created by the execution of the deed, the annexation of the schedule and inventory under oath, and the delivery of the deed to Garrison, the assignee? Here was an actual and voluntary delivery by the grantor. He parted with his interest as far as it depended on any act of his. A trust was created; the beneficial interest vested in the creditors, the *cestui que trusts*, though they knew nothing of it. If Reeves refused to act—and he was at liberty to do so, as no man can be made a grantee against his will—the trust was not thereby destroyed. It vested in Garrison, the remaining trustee, who had accepted, and he was competent to go on and execute the trust.

There is an old manuscript case cited in 3 *Eq. Ca. Ab.* 742, and said to have been decided at the rolls in 9 Geo. 2, which

holds the doctrine, that where two are appointed joint trustees of real and personal estate, if during their joint lives, one of them refuses to act, the other cannot act without him; but the trust devolves upon the court. If this was ever the doctrine of this court, it is not so at this time. It is now held, that where two trustees are appointed, and one dissents, the whole estate vests in the other: *Crewe* v. *Dicken*, 4 *Ves.* 100. In a later case in 2 *Swans.* 365, *Nicloson* v. *Wordsworth*, lord Eldon recognized the doctrine, and says: It seems to have been taken for law, from an older period than the date of *Crewe* v. *Dicken*, and sanctioned by lord Hale, that if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other; and he decided that a release by the trustee was equivalent to a disclaimer. The case decided by lord Hale is from *Vent.* 128, (*Smith* v. *Wheeler.*) Property was conveyed to B. and C. upon certain trusts, and B. dissented. The plaintiff, claiming under a demise by C., recovered. Lord Hale is reported to have said, "C. is a good lessor, for the other trustee's disagreement makes the estate wholly his." A variety of old cases are referred to, but it is considered unnecessary to cite them. The principle is recognized in the late case of *Adams* v. *Taunton*, 5 *Mad.* 438, and *Jeremy's Eq. Jur.* 138, and may be considered as settled law.

If, then, a trust was created for the benefit of the creditors, it is the duty of the court to see that it is properly executed; and it is not seen as yet, that the powers of the court are incompetent in this case to protect and secure the rights of all parties.

It is not necessary, perhaps not proper, in deciding this motion, that I should say more.

The injunction must be retained for want of sufficient answers, and I incline to the opinion it should be retained on the merits of the case so far as at present developed.

Motion denied.

ISAAC JACKSON v. JOHN JACKSON and JOSIAH HERITAGE, Executors of JOSEPH JACKSON, deceased.

The object of examining *a party* under oath, is to make a discovery of facts supposed to be within his knowledge, and of which the evidence cannot be otherwise attained.

In all matters of account in equity, it is the peculiar right of the party who seeks the account, to examine the accountant under oath, and thereby test his conscience as to facts and circumstances material to the investigation of truth and the ends of justice.

The mode of examination of a party in the English practice, is by written interrogatories, and there can be no cross-examination; but in New-Jersey the practice of oral examination, as well in relation to parties as witnesses, is universal; and the practice of cross-examination by counsel, it seems, is also universal. This practice approved by the court.

A party before a master cannot be cross-examined generally. He cannot make evidence for himself, by the introduction of facts or matters not the subject of inquiry on original examination. He can only be called on to explain, or to make such statements as may prevent misunderstanding, or rebut any unfair inference that may arise from the answer.

The errors of the master, in permitting the cross-examination of the party to be extended to improper matters, does not necessarily vitiate the whole report. If the same result is fairly attainable from a view of the evidence without the aid of the erroneous examination, the report will be confirmed.

It is improper for a master in his report to argue the case upon its merits. The province of the master is to report facts, and not arguments, for the information of the court.

THE master, having made his report in this cause, in pursuance of a decretal order, exceptions to the report were filed on the part of the complainant, and the cause came on for hearing upon the exceptions.

Chapman and *Williamson*, for complainant, in support of the exceptions.

Armstrong and *Wall*, for defendants.

Cases cited by complainant's counsel. 1 *Paige*, 122; *Hopk.* 239; *Hoffman's Master in Ch.* 14, 20, 21; 2 *Fowl. Ex.* 294; 11 *Viner*, 433; 3 *P. W.* 251; 1 *Vesey*, 115; 2 *Vesey*, 865; 1 *Ball and B.* 180; 1 *John. Chan. R.* 527; 1 *Jac. and W.* 68; 2 *Vesey, sen.* 58; 6 *Halsted*, 151-5; 1 *Ball and B.* 25; 1 *Wash. Rep.* 248; 1 *Peters*, 309; 2 *Mad. R.* 125; 1 *Vesey*, 43.

THE CHANCELLOR. This case comes up on exceptions to a master's report, made in pursuance of an interlocutory decree, entered by consent of parties on the twentieth of January, one thousand eight hundred and thirty-one. A brief statement of the pleadings is necessary to a proper understanding of the questions that have been made.

The bill charges, that on the sixth of September, one thousand eight hundred and nine, Joseph Jackson made his last will and testament, duly executed according to law to pass real estate; and afterwards, to wit, on or about the twenty-first of September, one thousand eight hundred and ten, died in the city of Philadelphia.

By the will, the testator gave to his son John Jackson, one half the Shippen place, of seven hundred and twenty-seven acres. He directed his executors to make sale of the other half of it, invest the money, and pay the interest annually to his son Isaac Jackson, during his life, and after his death to pay the principal to his children. To his sons Thomas and Henry, he gave a plantation, and pecuniary legacies to his daughters, Edith, Mary and Hannah. The residue of his estate he ordered to be divided equally among all his sons and daughters.

After the death of the testator, the executors, John Jackson and Josiah Heritage, proved the will; and on the second of March, 1811, in pursuance of their powers, sold the one half of the Shippen place, in three different parcels, as follows:—

To Daniel Seraw,	152	acres, for	$1120 15
" Edward Carpenter,	241	"	1269 37
" Jeptha Abbott,	5	"	85 75
Making in the whole,		-	$2475 27

On the same second of March, one thousand eight hundred and eleven, David Seraw sold and conveyed the part he had purchased to John Jackson, one of the executors, for the same amount he agreed to give. The bill charges that this part was worth more money, and also that the executors have not put out to interest the proceeds of the said sale, as they ought to have done, but have applied them to their own use.

On the thirteenth of August, one thousand eight hundred and twelve, John Jackson sold to Isaac Jackson, the complainant, a tract of land for the sum of nine hundred dollars, and on the fourteenth of August the said Isaac Jackson gave to the executors a bond and warrant of attorney for the payment of nine hundred and forty dollars and eighty-three cents, in ten years, with interest, payable yearly, and also gave to them a mortgage to secure the payment of said bond. It was agreed, as the complainant states in his bill, that the interest of the trust money or fund in the hands of the executors, should be applied yearly to the extinguishment of the debt thus created.

On the first of March, one thousand eight hundred and fifteen, a settlement took place between the complainant and the defendants, concerning the moneys due from him to the executors, and from the executors to him; and upon such settlement, John Jackson entered on the bond which the executors held against him the sum of one hundred dollars and four cents, towards the principal of the said bond; and it is charged, that at the time of the settlement, the said John Jackson wrongfully retained and kept back from the complainant the sum of ten dollars, on account of his trouble and as commissions for himself and Josiah Heritage, as executors and trustees as aforesaid.

On the fifth of March, one thousand eight hundred and nineteen, a further settlement took place, and a balance of sixty-two dollars and seventy-four cents was credited on the principal of the bond. Similar settlements took place in the years 1821, 1822, 1823, and 1824; and at each time the balance of interest due the complainant on taking the account, was applied to extinguish the principal of the bond so given as aforesaid by the said Isaac

Jackson to the said executors. On the first of March, one thousand eight hundred and twenty-four, when the last settlement was made, there was justly due and owing to the defendants, (the executors,) one hundred and seventy-one dollars, or thereabouts, according to the settlement as then made; and the complainant alleges, that at each of these settlements, ten dollars were retained as commissions.

The bill then charges, that on the twenty-third of April, one thousand eight hundred and twenty-four, the executors, by virtue of the warrant of attorney, entered up a judgment on the bond so given as aforesaid by the complainant to the said executors, and at the same time made affidavit that the sum of nine hundred and ninety-six dollars and forty-eight cents was justly due to them on said bond; that an execution issued against the property of the complainant to make the said amount. That the complainant then discovered the fraud that had been practised against him. He discovered that the several sums or balances due to him on the several settlements, instead of being indorsed on his bond as so much principal paid, had been indorsed as so much money paid generally on the bond, and not as so much principal.

The bill prays, that the defendants may set forth what is now justly due to them on the said bond for principal and interest, and come to an account with the complainant for the interest money due and to grow due on the trust fund, and also on the said bond; that they may be ordered to pay over what upon such account may be found due, and then be removed from their office as trustees; and in the mean time be restrained from further proceeding on the execution.

Upon this bill an injunction issued.

The answer of the defendants states, among other things that it was agreed between the executors themselves, that John Jackson should take charge of and manage the money coming to Isaac and his children, and that Heritage should take charge of and manage the share or portion of Edith West.

John Jackson admits the sale of the land to Isaac Jackson and that he took a bond and mortgage payable to the executors

The reason for so doing was, that he had so much more of the money of the estate than Heritage, his co-trustee, "and because so much money would thus be at interest under the will, of the amount of the Shippen place, ordered to be sold." He expressly denies, that any agreement whatever took place respecting the moneys due on said bond, at the settlement, being appropriated to the payment of the interest money due complainant under the will; and alleges, that at sundry times, he paid the complainant the interest money due him under the will, in full to the date of the payments, and took his receipts—the last of which receipts bears date in March, one thousand eight hundred and twenty-four. He also expressly denies, that any part of the principal money due on the said obligation was ever paid by the complainant to him the said John Jackson, or to the said Josiah Heritage, or any one else for his use; and both the defendants deny that they ever had with the complainant any settlement at any time of the amount due the said John Jackson upon the bond given by Isaac Jackson to the said executors, or any settlement of the amount due them jointly on said bond.

A replication was filed, and the case put at issue. On the twentieth of January, one thousand eight hundred and thirty-one, it was referred to one of the masters of the court, to inquire whether the defendants had put out to interest the money arising from the sale of half the Shippen place, and if so to whom, and when, and upon what securities; and where the same now is, and how secured; and how they have executed the trust; and how, and in what manner, and to whom, the said interest money has been paid; and to take and state an account between the parties in the cause generally, and particularly touching and concerning the said bond set forth in the bill; and report what payments have been made on the same, and whether the interest money arising from the said trust, or any part of it, has been applied to extinguish and satisfy the said bond, and what is now due thereon. And the master was directed to state an account touching the interest money arising out of the trust, and the payments of it, and to report any other special matter touching the

said bond, or the said trust money, or the interest thereof, that might appear material to the cause.

In September, one thousand eight hundred and thirty-one, the master made report on all the matters referred to him, at large; and to this report various exceptions have been taken by the complainant.

The exceptions are of two characters. The first, second and third, relate to the mode of proceeding before the master; and the others affect more immediately the merits of the controversy. They will be considered in the order in which they were presented.

First, the complainant excepts, because the master, in taking the account, permitted the defendants to be examined as to matters not authorized by the decree; and especially, because he permitted the defendants' counsel to examine John Jackson as to the payment of the interest arising on the trust fund, that not being authorized by the decree.

The second exception is, that the master admitted illegal evidence to prove the payment of the interest on the trust fund.

The third exception is that the master, under the direction "to examine the defendants under oath or affirmation touching and concerning the putting out of the said trust money and the securities thereof; has considered the said defendants, when examined, as witnesses in the cause, and their examination as testimony in their own favor; which is contrary to the practice and principles of this court, which only considers the examination of parties under such an authority in a decree, as taken for the purposes of discovery."

These exceptions will be taken together. They lead to an inquiry of some importance in the practice of the court, viz. whether defendants who are examined by a master under the direction of the court, can in any case be cross-examined by the counsel of such defendants touching the matter to which they have been examined.

The object of examining a party under oath, is to elicit truth; to make a discovery of facts supposed to be within his knowledge,

and of which the evidence cannot be otherwise attained. In all matters of account in this court, it is the peculiar right of the party who seeks the account, to examine the accountant under oath, and thereby test his conscience as to facts and circumstances material to the investigation of truth and the ends of justice. The mode of examination differs, in different places, and hence has arisen the difficulty in the present case. In the English chancery it is by written interrogatories, generally prepared and exhibited by the party seeking the examination, but settled by the master and considered as his act. These interrogatories, thus settled, are served on the examinant, and he puts in his answer in writing, on advisement of counsel. Full opportunity is given to consider of the interrogatories and the answers, and to give all proper explanations coming within the scope of the questions propounded. Under this mode of proceeding, there can be no cross-examination. Nor is it necessary or proper for the ascertainment of truth that there should be. The party charged has no right to be a witness in his own behalf. When examined by the adverse party, he is entitled to have the interrogatories before him, and time to answer advisedly and understandingly. Whatever is in answer to the question, or fairly explanatory of the answer, he has a right to state, but nothing more. If the answers, or any of them, are evasive or improper, exceptions may be taken, and the party be ordered to put in a sufficient answer. In this way the whole truth is elicited. Such is the English practice: *Cotton* v. *Harvey*, 12 *Ves.* 391; 1 *Newl. Prac.* 161; *Hoffman's Mast. in Chan.* 14—21; 1 *Hoffman's Prac.* 529, 533.

In New-York, the mode of examination has not been uniform. The first case to be found on the subject, is *Remsen* v. *Remsen*, 2 *John. Chan. R.* 495; in which the chancellor settles a variety of principles as to the mode of taking testimony, on an order of reference to a master. He states the English mode to be by the exhibition of interrogatories duly settled; and adds, that the practice in New-York, as he believes, has been more relaxed, and oral examinations have frequently, if not generally, prevailed; but he gives no rule on the subject of cross-examination, where

the relaxed mode is resorted to and the interrogatories dispensed with. In the *Office and Duties of Masters in Chancery*, by *Hoffman*, it is stated that the practice under the old mode may easily be adapted to the oral examination. The case of *Armsby* v. *Wood*, in *Hopkins*, 229, does not bring up the point. There the defendant, having been examined as to certain points by the complainant, insisted that he might go on and testify to other and distinct matters in reference; and the right, though allowed by the master, was denied by the chancellor. It would seem, however, from the case as reported, that there was no cross-examination. The court, indeed, said, that the party examined might give any explanation applicable to the subject; but it seems to be implied, that these explanations should be given on the direct examination. In *Benson et al.* v. *Le Roy et al.* 1 *Paige*, 122, the present chancellor (Walworth) has established the practice in the state of New-York, that there can be no cross-examination by counsel. "The ancient practice, (says the court,) was, to file written interrogatories for the examination of a party, to which he put in his answer in writing. The modern practice of examining orally before the master, does not alter the rights of either party. The examinant may accompany his answer by any explanation fairly responsive to the interrogatory, which may be necessary to rebut any improper inference arising from the answer."

The practice of oral examination is universal in the state of New-Jersey, as well in relation to parties as witnesses, and I believe the practice of cross-examination by counsel is also universal. The strict rule now adopted in New-York, by analogy to the English rule, where the examination is by interrogatories, has not been adopted here; or, if it has been, the court is not aware of it, and the practice is not in accordance with it.

I do not feel willing, at this time, entirely to change the practice of the court; for if it would be right in other respects, I am not satisfied that it would tend to the advancement of justice. These examinations, according to our mode, are conducted, not by the master, but by the counsel of the party obtaining the

reference. He examines, to certain points, at his own discretion and in his own way, having previously prepared his course of interrogation. The answers are given immediately, and without opportunity for advisement; and if the counsel of the examinant had not the privilege of cross-examination, the result would be more likely to mislead than properly instruct the mind of the master. To obviate this, it is said, the party may always answer under the advice of counsel, and thus incorporate into his answers all explanations allowable in inquiries of this kind. This, it is apprehended, would lead to the habit of preparing written answers, and thereby create delay; and it is not perceived that greater benefit would eventually result from it, than from the present mode.

The ordinary course of these examinations, shows that the difference in principle between the examination of parties and witnesses, is not well understood, or not well attended to. When a party is before a master, he cannot be cross-examined generally. He cannot make evidence for himself, by the introduction of facts or matters not the subject of inquiry on the original examination. He can only be called on to explain, or to make such statements as may prevent misunderstanding, or rebut any unfair inference that may arise from the answer. Such is the correct practice of this court, though too frequently departed from. There is no difference in principle between this and the strict mode. The same result is sought to be attained, though in different ways; and the court has no difficulty in abiding by its own practice, as now explained and defined.

In the present case, the master erred in allowing the defendant to be cross-examined by his own counsel, as to matters to which he had not been interrogated by the complainant. It was not necessary by way of explanation, or to prevent any misunderstanding of the defendant's previous answers. Most of the cross-examination had reference to facts entirely separate and distinct; and as the answers of the examinant could not be evidence upon any principle, they should not have been received. The master erred, also, in allowing the cross-examination to ex-

tend to matters not authorized to be examined into by the decretal order. He had power, under the order, to examine witnesses under oath or affirmation, as to all the matters embraced in the decree; but as regarded the defendants, his authority was to examine them "touching and concerning the putting out of the said trust money and the securities therefor," and nothing further. Why, in taking the account, the order for examining the parties was so limited, the court cannot say. The decree was prepared by the counsel of both parties, and made by and with their consent. The master, instead of confining the examination to the putting out of the trust money, and the securities therefor, permitted various inquiries as to the payment of interest on the fund, and on the bond given by Isaac Jackson to John Jackson and Josiah Heritage, and also as to the various settlements made by the parties—all tending to show, not how, or when, or where the money had been put out and invested, but that it had been paid and accounted for.

What is to be the effect of these errors of the master, will be considered hereafter. They do not necessarily vitiate the whole report. The evidence is all reported to the court; and if the same result is fairly attainable without the aid of the examinations, the report may be confirmed.

The master has stated an account of the interest due on the trust fund up to the first of March, 1831, and finds the amount to be eleven hundred and twenty-nine dollars and thirty-eight cents. About this there appears to be no dispute. He has also stated a separate account of the amount due for principal and interest on the bond given by Isaac to the executors, and states it to be thirteen hundred and eighty dollars and forty-four and a half cents, on the fourteenth of August, 1831. This is excepted to as erroneous, by the fifth, sixth and seventh exceptions, which will now be considered. They bring up the real matter in dispute, viz. what is due on the bond. If more than the amount of interest due Isaac on the trust fund, then he is indebted to the executors for the difference; if less, then the executors are indebted to him.

[Jackson v. Jackson's Ex'rs.]

It appears that there was in the hands of the executors, as trustees under the will of Joseph Jackson, deceased, a certain amount of trust money; part of which was for the use and benefit of Edith West, a daughter of the testator, and the residue for the benefit of Isaac Jackson, the complainant. This last was the proceeds of the sale of one half of the "Shippen place," directed by the will to be sold and invested, and amounted to two thousand three hundred and four dollars and ninety-five cents. The interest of this sum was to be applied annually to the support and maintenance of Isaac. It appears, also, that the executors made some division of the trust fund between themselves. The fund for Edith West was in the hands of Josiah Heritage; that for Isaac Jackson, which was much the larger, was considered to be in the hands of John Jackson.

In 1812, John Jackson sold and conveyed to Isaac Jackson, in fee, a tract of land of about ——— acres, for nine hundred and forty dollars and eighty-three and a half cents. No part of the money was paid, but Isaac gave his bond and a mortgage on the property to secure the payment of it. The bond and mortgage were made payable to the executors of Joseph Jackson, deceased, and not to John Jackson in his individual capacity; so that while Isaac Jackson had a claim every year against the executors, to the amount of the interest of the trust fund, they had a claim against him, at the same time, to the amount of the interest of the bond and mortgage.

It is shown that there were annual settlements between Isaac and John; and according to the testimony of Aquila Wells, the interest on the trust fund was all settled up to the spring of 1814; and he also states, that in making that settlement, the interest on the bond, though spoken of, was not taken into the account. The settlements were made in the month of March, and continued to 1824, when a dispute arose between the parties, and no further payments were afterwards made. At these settlements receipts were mutually given and taken. Those given by Isaac Jackson are all given to John Jackson, and are in full of interest to the time of their date, respectively.

1. The first one is dated,
March, 1816, for all the interest up to that date.
2. March, 1817, received $102 52, in full of interest.
3. March, 1818, " 100 52, do.
4. March, 1819, " 105 05, do.
5. March, 1820, " 100 11, do.
6. March, 1821, " 115 88, do.
7. March, 1822, " 123 99, do.
8. March, 1823, " 131 67, do.
9. March, 1824, " 130 85, do.

The receipts given by John Jackson are endorsed on the bond held by the executors against Isaac, and are for different sums, as follows :—

1. The first is dated,
March 1, 1815, for the sum of $100 04
2. March 1, 1818, do. 46 45
3. March, 1819, do. 60 74
4. March, 1820, do. 100 11
5. March, 1821, do. 115 88
6. March, 1822, do. 123 99
7. March, 1823, do. 131 67
8. March, 1824, do. 130 85

The first, second and third of these receipts, given by John to Isaac, are expressed to be for payments "towards the principal of this bond and warrant." The remainder are simply for so much money received on the bond generally.

If the three first receipts are taken literally, and the calculation made on the principle that at each of these times the interest was liquidated, and the amount endorsed to be deducted from the principal, then the amount due on the fourteenth of August, 1831, was five hundred and twenty-nine dollars and forty-one cents. If the receipts are taken for so much money paid on the bond generally, then the amount due at that time was, as before stated, thirteen hundred and eighty dollars and forty-four and a half cents.

The master, in making his report, has placed all these pay-

ments on the same footing, and considered them as general payments. He has considered the bond and mortgage as a private transaction, entirely separate and foreign from the trust fund, and that they were made payable to the executors through ignorance or inadvertence.

After examining the whole evidence, and duly considering the reasons given by the master in support of his conclusions, my mind has been brought to an entirely different result; and I must allow the exceptions to this part of the report.

Part of the answer of the defendant, John Jackson, is in accordance with the master's report. He denies expressly any agreement that the money due on the bond should be appropriated to the payment of the interest money due from the trust fund. He avers, also, that at sundry times he paid to Isaac Jackson the interest money due him under the will, and took his receipts; but it is to be observed that the allegation is very general, and does not undertake to state in what way the payments were made. He denies that any part of the principal money was ever paid to him on the bond by Isaac Jackson. Admitting this part of the answer to be responsive to the bill, it is evidence for the defendant, and must stand until overcome in the ordinary way. Is the evidence of the complainant, in connection with the circumstances and facts of the case, sufficient to overcome it? Believing that it is, I shall state very briefly my reasons for such belief.

1. The manner in which the bond and mortgage were drawn, is a very strong circumstance to show a connection between them and the trust fund.

John sold to Isaac a piece of land, and took a bond and mortgage for the amount. Instead of making it payable to himself, individually, he directs it to be drawn payable to himself and Heritage, as executors of Joseph Jackson. This could not well have happened, without some understanding on the subject. The direction must have been given to the person who prepared the writings; and it is impossible to conceive what could have prompted it, if the transaction had been considered strictly a

private one, without reference to the trust money in the hands of John, on behalf of the executors.

The bond was made payable ten years ahead, but it is expressly stipulated that the interest shall be paid annually. This is a strong circumstance to show that Isaac was to have an opportunity of paying for the property out of the interest of the fund. It will be found by calculation, that the balance of the interest of the trust fund, after deducting from it the annual interest on the bond, would, if applied annually to the payment of the principal of the bond, have discharged it in about eight years. If any part of the balance was taken to pay Isaac's debts, as was sometimes the case, it would take longer.

2. John admits in his answer, if I understand it correctly, that this bond and mortgage was considered part of the trust fund placed in the hands of Isaac.

He says, the reason he took the obligation payable to this defendant and Heritage, as executors, was, because he had so much more of the estate in his hands than Josiah; and because so much money would then be at interest under the will, of the amount of the Shippen place ordered to be sold. If on interest, it would be on interest in the hands of Isaac Jackson himself, to whom the annual interest of the whole trust fund was payable. And is it reasonable to suppose, that John would year by year have paid to Isaac the whole annual interest on the fund, without deducting out of it the interest on that part of the fund which was in the hands of Isaac himself? The use of the money on that bond was as so much interest paid by the executors, or by John, annually to Isaac, and if the interest on the balance of the fund which was in John's hands, instead of being paid over to Isaac, was credited on his bond, it was rightly credited as principal, and not as interest. It went to extinguish the debt itself.

3. There is another circumstance connected with this part of the answer, showing the connection between the bond and mortgage and the trust fund, and that they were intended to constitute a part of it.

John says, the bond was made payable to the executors, because he had so much more of the funds in his hands than Heritage. The idea was, that by making the bond payable to the executors, that which had been John's private property would become a part of the trust property, and subject to the control of both of them, so that Heritage would thereby be rendered more safe; and accordingly we find that John afterwards procured Heritage to give up that part of the trust fund in his hands that consisted of John's bond—for he had purchased a part of the land directed to be sold to raise this fund, and his own bond constituted a part of the fund. The bond and mortgage given by Isaac to the executors was so drawn, that it might be substituted for the bond of John in the hands of Heritage. They were not actually delivered over to Heritage, but were purposely drawn payable to the executors, that they might be viewed as a part of the trust fund out at interest; and because they were so drawn, John was enabled to get up his own individual bond, and substitute this as a part of the fund.

4. In the next place, the receipts themselves are explicit, and they are entitled to great weight. The manner in which the first three are drawn is peculiar, and it is not easy to perceive why they were thus worded, if they were not designed to mean just what they express. The money paid is expressed to be towards the principal of this bond and warrant. This is sufficiently explicit, and I have not met with any evidence or circumstances that explain it away. The defendants, in their answer, do not set up any fraud, or mistake, or inadvertence, in drawing the receipts. Two of them are in the hand-writing of John Jackson himself, and from what appears in this case of his knowledge of business, it is but just to presume he understood the difference between such a receipt and one in common form, or between principal and interest.

It is not possible, perhaps, after this lapse of time, to explain why the mode of indorsement was altered after the year 1819; but it is worthy of remark, that the payment of 1820 is so much larger than those of 1818 and 1819, as to induce the belief that

the interest then accruing is added to the usual payment of the principal; and hence the receipt is general, for so much paid on the bond, as it ought to be.

5. The testimony of David Carney is very important to show that the receipts are right as they stand, and were understood by the parties.

He states, that in the spring of 1818, he bought of Isaac Jackson the land which he had purchased of John Jackson, and agreed to give him one thousand dollars for it. The mortgage on it to the executors was to remain, and he was to give Isaac his note for the difference between the amount of the mortgage and the amount of the purchase money. He gave his note for two hundred and five dollars and sixty-five cents, on the ninth of May, 1818, and the difference between that and one thousand dollars, was what Isaac owed John on the bond and mortgage. This the witness understood from John himself. It did not come to quite eight hundred dollars. This could not be the case in the nature of things, if the two payments that were endorsed on the bond before that time be taken as general payments. The bond must have amounted to a much larger sum. But taking the indorsements as evidence of the payment of so much principal, besides the interest, and the evidence of Carney is fully corroborated. The two payments amounted to one hundred and forty-six dollars and forty-nine cents. Deducting that amount from the principal of the bond, it left a balance of seven hundred and ninety-four dollars and thirty-four and a half cents still due. Add to this balance the amount of the note given by Carney to Isaac, of two hundred and five dollars and sixty-five cents, and it makes nine hundred and ninety-nine dollars and ninety-nine and a half cents. The sum given was one thousand dollars. Carney says he afterwards gave up the place, and Isaac bought it back. It would have been more satisfactory if the note spoken of by Carney, or even the deed, had been produced. His statement would have been greatly confirmed, and would to my mind have been conclusive. As it is, the witness standing unimpeached, his statement is entitled to great consideration. He proves also a

conversation with John, about the time and manner in which John and Isaac made their settlements. John told him that he and Isaac settled every year. The interest on both sides was cast up, the one deducted from the other, and the difference was entered to the credit of Isaac on the bond. This he understood from both of them. John told him there would have been more credit on Isaac's bond, if he had not paid other debts for him. The private dealings of the parties being brought into the settlement, accounts for the difference in the amount of the receipts, and may account for the fact, that there is no indorsement on the bond for the years 1816 and 1817.

Leaving out of view all evidence, apparently of a doubtful character, that which remains, connected as it is with circumstances that cannot deceive, is much more than sufficient to overcome the answer of the defendant as to the mode of settlement. It establishes satisfactorily to my mind, that the bond was considered as a part of the trust fund, and that the settlements had reference to both. Nor is this conclusion shaken by the testimony of Aquila Wells. He says he was present at the settlement in 1814, and that the bond was not brought in; he is certain of it. Admitting this to be true, the witness himself assigns a very good reason for it. He says, that the money John had paid for Isaac amounted to almost the whole amount of the interest of the trust fund. There was a small balance, and this was paid in money, and a receipt given by Isaac to John. If it be true that John's private account against Isaac was nearly enough to meet the whole interest of the trust fund, it was natural that John should seek to be paid that first, and leave the interest standing on the mortgage, for that was secure. Hence it may well be true, as the witness states, that Isaac said the interest on his bond to John was not to be taken into the settlement *at that time.* It may be remarked, too, that John at that time requested payment of the interest on the bond, but it was not settled. And further, the witness in the first part of his examination, says expressly, there was a calculation made on *a bond*, which could have been none other than the bond in question. So that we see

the bond was talked of by both at the time. It was brought forward, and a calculation made of the interest; but the interest was not settled at that time, Isaac having no funds to pay with. All this is entirely consistent with the view now taken of the subject by the court.

I pass over the testimony of Mr. and Mrs. Hewitt. It is too equivocal to be the foundation of faith, in behalf of the complainant or the defendants.

In my opinion, the master has erred in this part of his report, in considering the bond and the trust fund as separate and unconnected; and in calculating the three first payments on the bond as general payments, instead of payments on the principal.

The fourth exception—respecting the claim and allowance of an annual commission of ten dollars for managing the trust fund, is disallowed; and solely on the ground, that the parties themselves have made their own arrangement and settlement on the subject. Were the matter considered properly open, the court would feel strongly inclined to reject the claim altogether; not for the want of any power or right to make an equitable and just compensation to trustees; but because the trustees, in this instance, have not done their duty in properly investing the trust fund committed to their care.

A question was raised as to the interest since the year 1824. I think there can be no doubt as to that point. The trustees are chargeable with the interest until the money is paid over or brought into court, and they are properly discharged from the trust.

The result is, that the first, second, third, fifth, sixth and seventh exceptions are allowed, and the fourth is disallowed.

I presume it will not be necessary to send the report back to the master. It will occasion delay, and the report may be corrected without that formality. The only question is as to the amount due on the bond, and that is easily ascertained from the statement made by the master in schedule fourth, accompanying the report.

Unless objections are interposed, the court will order the report to be corrected, so as to conform to the opinion here expressed.

I cannot close this opinion without remarking, that the course adopted by the master, of arguing the whole case upon its merits, as has been done in the report, and that too at great length, is novel, and will not, it is hoped, be considered as a precedent to be followed. The province of the master is to report facts, and not arguments, for the information of the court.

Abraham Suydam v. The Receivers of the Bank of New-Brunswick.

The act, entitled, "An act to prevent frauds by incorporated companies," passed the sixteenth of February, 1829, applies to incorporated companies whose charters were then in force, and in which there was no reservation to the legislature of a right to alter, modify or repeal the same.

The act regulates, rather than gives jurisdiction to this court.

Enactments of the kind contained in this statute, though retrospective in their operation, are not in a legal sense *ex post facto*. These terms, in legal phraseology, refer to crimes, pains and penalties.

Receivers appointed under the act may, in their discretion, on the ground of expediency, ratify a sale made by the company after insolvency, or a suspension of its business for want of funds, though such sale is declared by the act null and void as against creditors.

This cause came before the court upon an appeal from the decision of the receivers of the Bank of New-Brunswick, under the eighteenth section of the act, entitled, "An act to prevent frauds by incorporated companies," passed the sixteenth of February, 1829, (*Elmer's Digest*, 36,)—by which it is enacted as follows: "In case any such company, or person or persons whatever, shall think themselves or himself aggrieved by the proceedings or determination of the said receiver or receivers, or trustees, in the discharge of their duty, it shall be lawful for the party aggrieved to appeal to the chancellor, who shall in a summary way hear and determine the matter complained of, and make such order touching the same as shall be equitable and just; and

the chancellor, in the execution of the powers and authority under this act, is hereby vested with all the jurisdiction and power which is lawful for the court of chancery to exercise in suits depending in that court, and may proceed according to the rules, principles and practice of that court, excepting when otherwise directed by this act: and all cases brought before the chancellor under this act, shall be considered as depending in the court of chancery, and the orders and decisions carried into effect, the same as in other causes of equity jurisdiction."

Molleson, for the appellant.

E. Wood, for the receivers.

THE CHANCELLOR. On the eighteenth of February, one thousand eight hundred and thirty-four, the Bank of New-Brunswick suspended its ordinary business, and refused to redeem its notes in specie.

On the first of March following, Abraham Suydam entered into a written contract with the president and directors of the institution, for the purchase of certain real estate in the city of New-Brunswick; in which it was agreed, that he should pay them therefor the sum of eight thousand dollars in the notes of the Bank of New-Brunswick—two thousand dollars on or before the first day of May then next, and the residue on or before the first day of March thereafter. On the payment of the sum of two thousand dollars, possession was to be given. The deed for the property was made and executed, and delivered to James S. Nevius, esquire, to be by him delivered to Suydam, on his complying with the terms of the agreement.

On the twenty-eighth of March, an injunction issued against the bank, at the instance of the Mechanics' Bank of the city and county of Philadelphia; and on the second day of April, Edward Wood, George Richmond and David W. Vail, were appointed receivers.

On the first day of May, Suydam tendered to the receivers the

sum of two thousand dollars in the notes of the Bank of New-Brunswick, but the receivers refused to take the notes and confirm the contract. The following entry was made by them on their minutes, viz.:—

"May 1st, 1834. Abraham Suydam, of the city of New-Brunswick, tendered this day to the receivers, in bills of the bank, two thousand dollars, in part performance of a contract made by him with the officers of the bank since the suspension of business, for the purchase of real property belonging to the bank, situate in the said city of New-Brunswick. Understanding from Mr. Suydam, and from the agreement produced by him, of which the receivers have a duplicate copy, that by the terms of the contract, the sum of eight thousand dollars was to be paid for the property, in bills of the bank, by instalments; and believing that the property may be disposed of for about six thousand dollars—that the assets of the bank will not be more than sufficient to pay eventually more than forty cents on the dollar to the creditors; the receivers considered that, in the exercise of that discretionary power with which they conceived themselves invested to ratify or refuse to confirm such contract, they were bound to consult only the interests of the creditors and stockholders, and deeming the ratification of this contract prejudicial to those interests and derogating from the rights of the creditors, they refused to confirm it, and declined receiving said bills."

From this decision of the receivers, there has been an appeal taken, under the eighteenth section of the act, entitled, "An act to prevent frauds by incorporated companies," passed the sixteenth of February, 1829.

The facts stated in the petition of appeal, are not denied by the receivers, and the case has been submitted without argument.

Before considering the appeal on its merits, it is right to notice an objection, which, if well taken, will preclude the necessity of any further examination.

The petitioner submits, that the act under which these proceedings have been had, does not apply to the cases of incorpo-

rated companies whose charters were at the period of the enactment in full force, and in which there was not the usual reservation to the legislature, of a right to alter, modify or repeal the same; and because the charter of the New-Brunswick Bank, being granted prior to the act of 1829, the act, if intended to apply to it, is to that extent *ex post facto*, and therefore unconstitutional.

I think this objection unsound. The legislature had a perfect right to pass the act in question, and to include within its provisions all banking incorporations then in existence, as well as those which might thereafter be created. It is an act to prevent frauds by incorporated companies, and it would be strange if such an act should take away any vested rights of this or any other corporation. It relates to matters of fraud and breaches of trust; and directs the mode of proceeding when cases of that description occur. It regulates, rather than gives jurisdiction to this court.

Enactments of this kind, even if they may be considered in any wise retrospective in their operation, are not in a legal sense *ex post facto*. These words, when applied to a law, says justice Patterson, "have a technical meaning, and in legal phraseology refer to crimes, pains and penalties." And again he says, "They extend to penal statutes, and no further; they are restricted in legal estimation to the creation, and perhaps enhancement of crimes, pains and penalties:" *Calder et ux.* v. *Bull et ux.* 3 *Dall.* 386. So in the case of *Fletcher* v. *Peck*, 6 *Cranch*, 87, the chief-justice says, "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed;" showing very clearly that the act, objected to as unconstitutional, is not an *ex post facto* law.

As it regards the merits, there is but a single question raised. Did the receivers err in refusing to ratify the contract of the first of March?

Under the third section of the act, that contract was clearly unlawful. The company had suspended their usual banking operations, and refused to pay specie. It is not alleged that they proposed shortly to resume business. The appellant knew of

the suspension; and, although acting on both sides in good faith, he must have known, or ought to have known, that the law peremptorily forbids the sale or transfer of property, after the ordinary business of a bank is suspended for want of funds. There is but one exception made, which is the case of a bona fide purchaser, for a valuable consideration, without notice. Such purchase shall not be impeached; and the rule, "*Expressio unius est exclusio alterius*," well applies to all others.

In refusing to confirm the contract, on the ground of any right claimed by the petitioner, I think the receivers acted properly. The petitioner had no lawful claim against them.

But the receivers might have ratified it in their discretion, on the ground of expediency; and the principal complaint is, that they refused to make such arrangement. It is alleged by the petitioner, that his purchase was bona fide; that after the suspension of specie payments, the affairs of the bank were examined by the officers, and the result was a perfect conviction of its solvency; that a notice was published by the cashier, requesting holders of bills not to sacrifice them, and informing them that the corporation was able to discharge all its just debts; that the bank continued to receive its notes and bills at par in payment of debts, and to pay in specie or notes of other incorporated banks current at par, all debts due for deposites; that under these circumstances the contract was made; that he was not guilty of any fraud or circumvention in the purchase; and he believes that in the sale the bank acted in good faith, and for the best interests of the said corporation.

Taking all this to be true, as admitted, and taking also the statement of the receivers to be true, that the property is worth six thousand dollars, and that the notes of the bank will not be worth, as it is supposed, more than forty cents in the dollar; I think they did right in declining to ratify the agreement, on the ground of expediency.

The great duty of the receivers is, faithfully to collect and justly to disburse the assets, constituting the trust fund. In doing this, they are properly invested with a discretionary power to

compound and settle; but in the exercise of such power, they must keep primarily and constantly in view, the interests of those for whom they act. According to their estimate, it would have occasioned a loss of two thousand eight hundred dollars; and I cannot conceive how the ratification of the contract, under such circumstances, could have been considered either just or beneficial to those interested in the fund.

It is not intended by this opinion to preclude any compromise or settlement from being made between the parties. The question before the court is as to the correctness of the course taken by the receivers in refusing to affirm the contract, and nothing more. The petitioner, it is true, prays that if the decision of the receivers should not be wholly reversed, the court may make such order and direction as shall be just and equitable; but the court is of opinion that nothing more is necessary or proper to be done at this time. In this matter, the court sits in an appellate capacity, and has given its judgment on the only point decided by the receivers.

Whether this is a case which, taking all circumstances into consideration, presents proper grounds of equity and good conscience for a compromise, and if so, upon what just and reasonable terms it should be made, is for the receivers to judge of in the first instance. It does not appear that any offers of compromise or adjustment have been made or considered, and, of course, the appellant is not aggrieved by any decision in relation thereto, for none such has been made.

The decision of the receivers is affirmed.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

OCTOBER TERM, 1834.

JACOB VANDERPOOL, POLLY DANTEROCHES, NANCY HOWEL and EDWARD VANDERPOOL v. JAMES VANDERPOOL, Executor of APPHIA DAVENPORT, deceased.

Where a bill is filed for a surplus or residuum to be paid after the payment of debts and legacies, or other prior incumbrances, the creditors, legatees or prior incumbrancers need not be made parties.

And the rule is not altered, though the legacies are not to be paid immediately, and though a part of the residuum may by possibility be wanted to make up a deficiency arising from accident or loss happening before payment.

But all persons interested in the residuum, though their interest depends on remote contingency, must be made parties.

No person against whom a decree cannot be had, should be made a party.

Where by the terms of a will the real estate is ordered to be sold, and the residue of the estate, real and personal, is bequeathed, and directed to be paid after the payment of certain pecuniary legacies, which cannot be paid till a future time; the residuary legatees are entitled to an account, and to have the real estate sold and the proceeds applied in the course of administration, before the time arrives for the payment of the particular legacies.

And if such appears to have been the intention of the testator, the court will order the residuum to be paid over to the residuary legatees, before the particular legacies are paid; but this will not be done at the expense of the executor, or at the hazard of his safety.

[Vanderpool et al. v. Ex'r of Davenport.]

Executors and trustees, while acting faithfully in the discharge of their duty, ought in no case to be losers.

BILL by residuary legatees, praying an account of the real and personal estate, and to have the residuum paid over. The cause was heard upon the bill, answer, replication and proofs.

E. W. Williamson, for complainants.

E. Vanarsdale, for defendant.

Cases cited for complainants. 2 *Cas. in Chan.* 124, 178; 1 *Vernon*, 413; 3 *Bro. C. C.* 229; *Ibid*, 365; 1 *Cox*, 352; 3 *John. Chan. R.* 553; 16 *Vesey*, 326; 1 *Bro. C. C.* 303; 1 *Vernon*, 261.

Cases cited for defendant. *Preston on Legacies*, 236, 304; 2 *Dess.* 115; 1 *Cond. Chan. R.* 465, 186; 3 *Bro. C. C.* 258; 1 *Meriv.* 417; *Ambler*, 34; 1 *P. W.* 495.

THE CHANCELLOR. The complainants are residuary legatees under the will of Apphia Davenport, deceased. They call for an account of the real estate, (which was ordered to be sold,) and also of the personal; and, alleging that the estate is sufficient to satisfy the debts and pecuniary legacies, and admitting that the legacies are to be paid according to the will, they seek to have the clear balance or residuum of the estate ascertained, and to have it paid to them by the executor, according to their respective rights.

The testatrix, by her will, after ordering her debts to be paid, gives to her sister, Catharine King, two thousand dollars, under the following conditions: that the sum of two thousand dollars be put at interest by her executor, and the interest accruing thereon be paid to her yearly while she remains the wife of Henry King; but in case she does not become a widow, and dies before her husband, then the said sum of two thousand dollars to be divided as follows: one thousand dollars to be paid to her

brother, Jacob Vanderpool; the other thousand dollars to be paid, in equal shares, to her sister, Polly Danteroches, and the lawful heirs at law of Deborah Seabury, wife of John Seabury, both now deceased. She also gives to Alexander Mulford the sum of two hundred and fifty dollars, to be paid him when he becomes twenty-two years of age, and in case of his death before that time, that the money be paid to his brothers and sisters in equal shares. She then gives sundry pecuniary legacies payable absolutely, and directs that after the legacies given shall be paid, the remainder of the estate shall go to the complainants in equal shares.

The defendant admits the will, and that the complainants are the residuary legatees; and craves the direction of the court, in relation to his own safety, and the rights of the complainants. He submits whether he is bound to pay over the residuum of the estate, until all the legacies are fully satisfied; that there is no plain word of reference in the will whereby the sum of two thousand dollars, directed to be paid over in case of the decease of Catharine King in the life time of her husband, is the same two thousand dollars ordered to be put out at interest; and whether, in case of any loss by insolvency or otherwise, (without the default or negligence of the executor,) such loss would not fall on the executor. He also states, that Alexander Mulford has not yet attained the age of twenty-two years; that when he shall attain that age he will be entitled to receive his legacy without any abatement or loss, and he insists that if there be loss, it should fall on the residuum of the estate.

The defendant objects that Catharine King and the lawful heirs of Deborah Seabury, and also Alexander Mulford and his brothers and sisters, or at least Catharine King and Deborah Seabury, are not parties to this suit; and that unless they are brought in, he will not be safe in the performance of any decree of the court.

The objection for the want of parties, is not well taken. Catharine King and Alexander Mulford are not interested in the distribution of the estate, or in the account to be taken. If they

were, it would be necessary to make them parties, so that only one account might be taken, and one distribution made. This principle is strictly adhered to. Even when the interest in the residuum depends upon a remote contingency, the persons interested must be made parties: *Sherrit* v. *Brick*, 3 *Bro. C. C.* 229. But a legatee who is entitled to priority of payment, may file a bill for his legacy without making the residuary legatees parties to the suit; and so may creditors, although in this last case there appears to be some reason for making them parties; for, as was said by lord Loughborough, they are interested to resist the demands, lest the residuary fund should be exhausted by collusion: *Lawson* v. *Barker*, 1 *Bro. C. C.* 303; *Wainwright* v. *Waterman*, 1 *Ves. jr.* 311; *Brown et al.* v. *Dowthwaite*, 1 *Madd. R.* 242; *Edw. on Parties*, 138. So where a bill is filed for a surplus or residuum to be paid after the payment of debts and legacies, or other prior incumbrances, the creditors, legatees or prior incumbrancers need not be made parties: *Mitf. on Pleading*, 233, last edition. And the reason is obvious. Their claims and priorities are admitted, and of course they are not interested in the account to be taken. There can be no residuum until they are satisfied.

There is an apparent difference in the case now before the court, from those cited, inasmuch as these legacies are not to be paid immediately, and therefore the legatees may be considered as interested in the residuum, inasmuch as part of it may be wanted to make up any deficiency arising from accident or loss, happening before payment. I think, however, this is not sufficient to break in on the rule, and that if the executor is entitled to any protection against such a contingency, it must be given him in some other way.

As between the complainants in this suit and these legatees, there is nothing to controvert. There is no question as to their rights, and it is not perceived that any valid decree could be had against them; and, in general, no person against whom a decree cannot be had, should be made a party: *De Golls* v. *Ward*, 3 *P. W.* 310, *note*; *West* v. *Randall et al.* 2 *Mass. R.* 102.

As regards the main question in the case, the complainants are clearly entitled to an account. They have a right to know how the estate has been managed, and what its present situation is; and they are entitled to have the real estate sold, and the proceeds applied in a course of administration.

The defendant, however, submits to the court whether he is to pay out the residuum of the estate, until the legacies are first fully paid; and if so, whether he is to be held liable for any loss that may be sustained, as the legacies are not to be paid out until a future day, and must be retained in the hands of the executor.

The will on this subject is not without obscurity. It would seem at first, as though the testatrix intended to set apart a particular fund of two thousand dollars out of the estate, the interest of which was to be paid annually to Mrs. King, and the principal, either to her after the death of her husband, or to other persons upon her dying in the life-time of her husband; and if the fund should suffer any loss, it must be borne by those who are to receive it. But I think the instrument should not receive that construction. If Mrs. King survive her husband, she is to receive at the hands of the executor two thousand dollars. There is to be no abatement for loss. It is not the fund that is to be paid to her, or the balance of it, but the specific sum of two thousand dollars, and nothing less. And so if she dies in the life-time of her husband, the specific sum of one thousand dollars is to be paid to Jacob Vanderpool, and the other thousand dollars, in equal shares, to other persons. I see nothing to prevent these persons from calling on the executor for the whole amount, nor do I see how he could defend himself against the claim. Courts of equity have gone very far to protect executors and trustees, while acting faithfully in the discharge of their trusts, and they ought in no case to be losers. The cases of *Soundy* v. *Binyou*, 3 *Bro. C. C.* 258, and *Breton* v. *Lord Clifden*, 1 *Sim. and Stu.* 363, go far to show, that the security shall not be lessened in the hands of the executor; but they are both plainly distinguishable from the one now before the court, and I do not feel justified in placing myself upon them.

Here is a clear estate of upwards of four thousand dollars, besides the real property not yet sold. The amount of the two legacies to be paid out of it is two thousand two hundred and fifty dollars, not more than one half the amount. I cannot think it was the intention of the testatrix that the whole amount should remain in the hands of the executor until the contingencies shall happen upon which the legacies are to be paid out, lest there should be any loss, and yet there are words in the will that favor such construction. For instance, the testatrix gives the residue to the complainants, after the legacies given shall be paid. Now it is plain these legacies cannot all be paid at this time, and some of them may not be paid for years to come. But it is believed, this general and usual direction may be satisfied without leaving the whole of the estate in the hands of the executor, and that the intention of the donor will be best subserved, by construing the will so as to give each one his own with the least delay. This must not be done, however, at the expense of the executor, or the hazard of his safety; and when a decree for distribution shall be made, at the coming in of the account, he will be entitled to such indemnity as the court shall then direct.

Let there be a decree for an account, &c.

NATHANIEL BRITTON v. LEVI UPDIKE and wife, ELIZABETH UPDIKE, widow, and SAMUEL UPDIKE and CORNELIUS GROVER, Adm'rs of WILLIAM UPDIKE, deceased, JOHN W. DYE, THOMAS GRIGGS, WM. MERSHON and WM. BAYLES.

Where mortgaged premises are sold by the mortgagor in parcels to various purchasers, at different times, there can be no contribution among the purchasers. The older purchasers and their shares are exempt, until the younger ones and their shares shall have responded to the claim; and they must answer, respectively, in the order in which they have purchased, beginning with the youngest purchaser and ending with the eldest.

[Britton v. Updike et al.]

This order is to be observed, unless there are peculiar circumstances affecting the rights of parties, to change the rule.

Hardenburgh, for complainant.

Hamilton, for Griggs, Mershon and Bayles, three of the defts.

THE CHANCELLOR. The bill is for the foreclosure and sale of mortgaged premises in the county of Middlesex. There is no dispute as to the mortgage itself; but the mortgagors having sold the property in different parcels since the mortgage given, there has been a difference of opinion as to the liability of the parties, and the manner in which the money shall be raised; and to this point the attention of the court has been directed by the counsel.

It appears, that in 1809, Levi Updike and wife, and William Updike (now deceased) and his wife, made a mortgage to the complainant, on one hundred and sixty-nine acres of land, in the township of South-Brunswick, and lying south of a certain stream of water, known by the name of Drinking Brook. The amount to be secured by the mortgage was one thousand nine hundred and eighty-four dollars and fourteen cents.

On the seventh of March, 1814, the mortgagors sold and conveyed to William Mershon a lot of land, in which was included about nine acres of the mortgaged premises.

On the same seventh of March, 1814, they sold and conveyed to William Bayles a lot of land, in which was included about twelve acres of the mortgaged premises.

On the thirtieth of April, 1816, they sold and conveyed to Thomas Griggs another lot of land, in which was included about fifty-two acres of the mortgaged premises.

The residue of the premises remained in the possession of the Updikes, as is stated by one of the witnesses, for about two years after these sales, and then came into the possession of John W. Dye, who still holds it. This defendant has put in no answer, and suffered a decree pro confesso to be entered against him. By what title he claims right to the possession of the premises does not appear.

Under this state of facts, if there be no peculiar circumstances affecting the case, the rights of the parties can admit of no dispute. The part of the property that remains in the hands of the mortgagors, or of Dye, if he be the owner, is first liable to pay the mortgage debt. If it still belong to the mortgagors, then it is surely just that it should bear the burden of the mortgage debt, before the other parts of the property, which have been sold for a valuable consideration, are called on to contribute. If it has been sold to Dye, he "*sits in the seat of his grantor*," and takes it with the incumbrance as it existed in his hands.

If this residue be insufficient to make the money due, then the part sold to Thomas Griggs is next liable, and must make up the deficiency. When Griggs purchased, both Mershon and Bayles were in possession of parts of the property by purchase from the mortgagors, for a valuable consideration; and these are to be exempted until all the remainder is appropriated to the payment of the debt.

If there should still be a deficiency, the shares of Bayles and Mershon are next liable. Their titles are of the same date. They stand *in equali jure*, and must contribute rateably, according to the proportions held by each of them.

The rule on this subject is well established, and has been repeatedly recognized in the courts of New-York, as well as our own state: *Clowes* v. *Dickenson*, 5 *John. Chan. R.* 235; *Gill* v. *Lyon*, 1 *John. Chan. R.* 447; *Ex'rs of Clymer* v. *Ridgeway et al.*, *Opin. of Ch. Williamson*, *Oct.* 1827. Other cases might be added, if there were a doubt upon the subject.

The counsel of the complainant appeared to think that the present was a case of contribution, and that all the different purchasers stood before the court *in equali jure*. This would be so, if they had acquired their rights at one and the same time; but having purchased in succession, there can be no contribution among them. The older purchasers and their shares are exempt, until the younger ones and their shares shall have responded to the claim; and they must answer, respectively, in the order in which they have purchased, beginning with the youngest pur-

chaser and ending with the oldest. This is the order to be observed, unless there are peculiar circumstances affecting the rights of parties so as to break in upon the rule.

The defendants, in their several answers, claim an entire exemption from the operation of the mortgage, because they purchased for a valuable consideration, and paid the money under the full assurance given by the mortgagors, that it should be applied to extinguish so much of the mortgage debt. These allegations, not being responsive to the bill, or supported by any kind of proof, cannot be received as evidence. The replication has put them directly in issue, and they are not proved. Even if they were proved, it would not avail the defendants, unless they could show farther, that the money had actually been paid, and paid too in discharge and release of the property they had severally purchased.

Bayles states that he actually paid to the complainant himself seven hundred and fifty-eight dollars and twenty-six cents, being part of the purchase money, and more than the value of the twelve acres of the mortgaged premises which he purchased, and that it was endorsed on the mortgage and passed to the credit of the mortgagors in different sums, and was accepted by the complainant in full satisfaction and discharge of so much of the mortgaged premises as he had purchased, and in release thereof. But the evidence does not sustain the allegation. It appears by the bond, that the sum of seven hundred and fifty-eight dollars and twenty-six cents was actually received by the mortgagee, and that it was passed to the credit of the mortgagors in different sums, as he states; but it does not appear by the endorsement, that the money was paid in release of the Bayles lot, or that it was even paid by Bayles. On the contrary, it is endorsed as having been paid by William and Levi Updike, the mortgagors.

Mershon, who purchased at the same time with Bayles, does not allege that he paid any part of the consideration money to the mortgagee, or that there was any express understanding or agreement between him and the mortgagee that his part was to be released.

As regards these two purchasers, then, there is nothing to take them out of the general rule, or create any exemption in their favor.

Griggs, who purchased in 1826, sets up no agreement between him and the mortgagee as to the release of his part. He states, however, that he paid sixty dollars of the purchase money to the mortgagee, and the residue of it (eight hundred and ninety dollars) to the mortgagors; and that the sixty dollars was endorsed on the bond. By reference to the bond, which is in evidence, it appears that Griggs did actually pay sixty dollars on the bond, on the nineteeth of May, 1817, about a year after his purchase. If there was evidence of an agreement between this purchaser and the mortgagee, that his property should be released to the amount of the purchase money he paid him, there might be some claim of equity between them as to that amount. Whether it could affect in any way the rights of prior or subsequent purchasers, so as to increase their liabilities, is a point on which I give no opinion. The evidence is insufficient to warrant any interference.

The case, then, is free from embarrassment. The property in the hands of Dye is bound for the whole balance of the debt and the complainant's costs. If, after the payment of the costs, it shall be insufficient to pay the debt, the balance is to be raised out of the part purchased by Griggs; and in case that also shall prove insufficient, the shares of Mershon and Bayles must contribute in proportion to their respective values at the time of the sale.

Let it be referred to a master to take an account of the sum due on the bond and mortgage.

SAMUEL WILLIAMS and AMOS WILLIAMS v. CALEB C. WILLIAMS.

A writ of *ne exeat* will not issue unless there is a debt due from the defendant to the complainant, or unless the complainant is entitled to an account.

THE cause was heard on the twenty-sixth of September, 1834, upon motion for an injunction and *ne exeat* on the bill filed. It appeared by the bill that the complainants had agreed to purchase a lot of land of the defendant, in the county of Essex, and had paid one half the purchase money, and been let into possession. The defendant then refused to execute a deed, or to receive the balance of the purchase money, solely on the ground, as the complainants charge, that he has been offered an advance on the property, and intends to convey it to some other person. The bill charges, that the defendant has lately sold out his property in this state, and intends in a few days to remove with his family into the state of Ohio; and that unless restrained by the order of the court, he will convey away the said property and withdraw himself permanently from the state.

C. H. Halsey, for the application.

THE CHANCELLOR. This is a proper case for an injunction, but not for a *ne exeat*. Here is no debt, either legal* or equitable, due from the defendant to the complainants, nor are the complainants entitled to an account. Such a demand is necessary to sustain the writ. This is the general rule. In this case, there is not even a claim for damages; and if there were such claim, it would not be sufficient. *Eden* v. *Rathbone*, *Opin. of Ch. Wil-*

* The writ is only granted in case of an *equitable* debt or demand, and is not granted for a mere legal demand, for which the defendant may be held to bail, except in a matter of account or in a suit for alimony: *Amsinck* v. *Barklay*, 8 *Vesey*, 594; *Pearne* v. *Lisle*, 1 *Ambler*, 75; *Flack* v. *Holm*, 1 *Jac. and W.* 405; *Anon.*, 2 *Atk.* 210; 1 *Smith's Chan. Prac.* 576; 2 *Mad. Chan. Prac.* 227.

Jamson, Jan. 1828; *Beame's Ne Ex.* 37; 2 *Madd. Chan.* 226; 1 *Jac. and Walk.* 405; 2 *Jac. and Walk.* 213; 10 *Ves.* 166.

It is to be presumed that the injunction will be sufficient to restrain the party from an improper conveyance of the property; and if so, it is a matter of little consequence to the complainants whether he leave the state or remain. The suit can proceed in his absence; and if the decree be in favor of the complainants, it will operate as a conveyance in case the defendant fails to execute a deed according to the order of the court: *Rev. Laws*, 499. If, notwithstanding the injunction, the defendant should execute a conveyance, the proper remedy will be by attachment for a contempt; and in such case, if he had removed out of the state, the defendant would be deprived of that remedy, and there might possibly be a failure of justice. But the court cannot consent to grant this high prerogative writ, on the assumption that a party will disobey its solemn injunction, and render himself obnoxious to its censure and punishment.

The motion for a *ne exeat* is denied. Let an injunction issue.

GIDEON SCULL and NEWCOMB B. THOMPSON v. THOMAS REEVES and others.

If a deed made by a debtor for the benefit of his creditors, has once taken effect, the cancellation or destruction of the deed, either fraudulent or accidental, cannot affect the rights of the parties; nor has the grantor power to revoke it.

The fact that one of the assignees renounced in writing, and that the other one relinquished the trust by giving up the deed of assignment, presents no serious obstacle to the execution of the trust. It is in the hands of the court, to be executed under its direction, according to the law and the intention of the parties, and the court will see that it is properly done.

That the grantor was under some misapprehension as to the mode and time of making sale of his property, and that he was ignorant of some of the

[Scull and Thompson v. Reeves et al.]

requirements of the statute and the duties of the assignees, will not operate to set aside the deed.

The trust will be caried into effect, although a compliance with all the directions of the statute, in regard to the proceedings of the assignee, as to matters rather of form than substance, is impracticable.

THIS cause was heard before the chancellor at April term, 1834, upon a motion to dissolve the injunction, on the answers of the defendants. The motion to dissolve the injunction was denied, and receivers were appointed. Testimony was taken by both parties, and the grantor and grantees in the deed of assignment, three of the defendants, were examined on the part of the complainants, under an order of the court obtained for that purpose. The main facts elicited by the evidence are adverted to in the opinion of the chancellor.

The cause came on for hearing at July term, 1834, upon the bill, answer, replication and proofs.

Wall, for complainants.

Jeffers, for defendants.

Cases cited by complainants' counsel. 4 *Com. Dig.* 157, *A.* 3, "*Delivery*" 7; 12 *John. R.* 552; 1 *Shep. Touch.* 58; *Shelton's* case, *Cro. Eliz.* 7; 4 *Dane's Ab.* 91, sec. 13, 14; 12 *John. R.* 548; 1 *Bin.* 518, 519; 13 *Serg. and R.* 524.

THE CHANCELLOR. The object of the bill in this cause was to establish an assignment made by Thomas Reeves, to Daniel B. Reeves and George W. Garrison, in trust for the benefit of his creditors, under the statute, on the eighteenth of February, 1834; which trust was afterwards renounced by one of the assignees, and the deed given up to be cancelled by the other one, on the twentieth of the same month. The complainants, who are general creditors, sought also to injoin a number of judgment creditors, who had obtained judgment and execution after the assignment made and surrendered; and they alleged that the

surrender and cancellation of the assignment was procured from Reeves by promises of the judgment creditors, that they would give him time of payment. On the coming in of the answers a motion was made to dissolve the injunction that had been granted on filing the bill; and after argument, the motion was denied, because, in the first place, the equity of the bill had not been fully answered; and also, because the court was inclined strongly to the opinion, from the answers themselves, that the deed of assignment had been duly executed and delivered; and that the trust having vested, the deed ought to be established for the benefit of all the creditors, whether it should turn out upon the evidence to have been delivered up by collusion or otherwise. The views of the court were fully expressed in the opinion pronounced at the last term,* and it is unnecessary to repeat them.

The cause came on to be heard on the merits, at the July term; and from the testimony of Thomas Reeves, the assignor, and Daniel B. Reeves and George W. Garrison, the persons appointed to act as assignees, there remains no doubt that the deed of assignment was duly executed and delivered, and that the assignees accepted the trust. It is also clear, that the deed was not delivered up until the twentieth of February. Up to that time it was a valid, operative instrument. Every thing necessary to give it effect on the part of the grantor, had been done, and the property was vested in the assignees for the purposes of the trust. There is great reason to believe, that the views of the assignor were changed by the representations and inducements made and held out by some of the creditors, to whom judgments were afterwards confessed. It was promised that a year's delay should be given. The execution of Moore, which was previously in the sheriff's hands, was to be arranged, and he was induced to believe that such course would be the best one for himself and all his creditors.

I do not think it necessary to inquire how far the conduct of those creditors who were instrumental in causing the deed to be given up and cancelled, with the view of preventing or destroying

* See ante, page 85.

the effect of the trust, is fraudulent or otherwise. For if the deed took effect, as I am satisfied it did, it is not material to the creditors now seeking relief, whether the cancellation was fraudulent or accidental. The cancellation or destruction of the deed could not affect the rights of the parties. Nor had the grantor power to revoke it. He had given to his creditors a right, of which no power of his could divest them. It is not considered necessary to fortify so plain a principle by legal authorities. It is familiar and undoubted. The fact that one of the assignees renounced in writing, and that the other one relinquished the trust by giving up the deed of assignment, presents no serious obstacle to the execution of the trust. It was fully shown in the former opinion delivered in this case, that where the trust had once been created, it should not fail for want of trustees. It is in the hands of the court, to be executed under its direction, according to the law and the intention of the parties, and the court will see that it is properly done.

The principal ground of defence urged at the hearing, was, that Reeves, the grantor, was not acquainted with the nature and effect of the instrument; and that he executed it under a mistaken idea of its operation. There is some evidence which favors this position, but not sufficient to destroy the validity of a solemn deed. The whole evidence goes to show that his object was to distribute his property among his creditors, and he thought there was enough to pay all. He made out a schedule of his effects, and a list of his creditors; and he expected to give up, and did give up all, into the hands of his assignees. It is probable he was under some misapprehension, as to the precise mode and time, of making sale of his property. He might have been ignorant of some of the requirements of the statute, and the duties of the assignees; but this would not operate to set aside the deed. I think, however, it is pretty evident, that these misapprehensions would have interposed no difficulty, had it not been for the promises of delay and forbearance held out by some of the creditors. After that, the difficulties appeared to thicken in the mind of the grantor; new views of the subject were presented

and pressed; and, becoming a willing convert to the idea that it was better for him to manage his own concerns, he resolved it was best to pursue the course which would lead to that result; and, accordingly, he assented to the surrendering of the deed of trust, and afterwards destroyed it.

There being no well founded objection to the instrument, it remains, as to its legal results, notwithstanding its destruction. It would be a reproach to justice, to suppose a want of power in this court to secure the rights of the *cestui que trusts*, and carry into effect the original intentions of the grantor.

Difficulties were suggested about a compliance with the statute in regard to advertisements and other proceedings, the time having passed. Many of these provisions are merely directory, and the rights of parties are not made to depend on a literal compliance. Such has been the course of decision by the supreme court, in cases of attachments commenced in the common pleas, and removed to the supreme court by certiorari. They have found no difficulty in carrying out the intention of the statute, although it was impossible to comply with all its requisitions as to matters rather of form than substance.

I shall accordingly decree in this case, that the trust be established, for the benefit of all the creditors, according to the provisions of the law on the subject of assignments, and to operate and take effect from the date of the deed; that the said Thomas Reeves be required to execute a deed in the usual form in such cases, to such trustees as the court shall direct or approve, and to annex to the same a schedule of his property as it was before it went into the hands of the receivers, and a list of his creditors with the amount due to them respectively; that these be filed, and that the assignees proceed to execute the duties of their appointment as the statute requires.

The receivers will account to them under the direction of the court, for the property they have received.

Decree accordingly.

The Attorney General v. The New-Jersey Railroad and Transportation Company and others.

A court of equity has jurisdiction to a certain extent in cases of public nuisance, although it has been rarely exercised.

The common law courts have an undisputed jurisdiction over public nuisances by indictment, and a court of equity ought not to interfere in a case of misdemeanor, when the object sought can be as well attained in the ordinary tribunals.

The injunction is a preventive remedy; if the injury be already done the writ can have no operation, for it cannot be applied correctively so as to remove it.* It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong.

This was an information filed by the attorney general of the state of New-Jersey, in behalf of the state, at the relation of Luke Davis, John Caldwell, Robert Baldwin, John Williams, Abraham Cadmus and James R. Mills, for and on behalf of themselves, and the rest of the owners of property in the town of Newark and on the banks of the Passaic river, to compel the defendants to abate a public nuisance created by them by the erection of the railroad bridge across the river Passaic, at Newark. The material charges contained in the information are stated in the opinion of the chancellor.

The prayer of the information is, that an injunction issue restraining the defendants from doing any further work in, upon, or about the said railroad bridge, and that the said work be stopped until the further order of the court, "and that the defendants be decreed to obviate and abate the said nuisance, and that the

* The general principle is as stated by the chancellor. But the rule admits of exceptions, and as applied to the abatement or removal of nuisances, either public or private, it seems not to be universally true that the remedy by injunction cannot be applied: *Attorney General* v. *Richards*, 2 *Anst.* 603; *The East India Co.* v. *Vincent*, 2 *Atkyns*, 83; *Robinson* v. *Lord Byron*, 1 *Bro. C. C.* 588; *Anon.* 1 *Vesey*, 140; *Lane* v. *Newdigate*, 10 *Vesey*, 193; *Attorney Gen.* v. *Parmenter*, 10 *Price*, 378; *Van Bergen* v. *Van Bergen*, 2 *John. Chan. R.* 272; *Van Bergen* v. *Van Bergen*, 3 *John. Chan. R.* 282; *Hammond* v. *Fuller*, 1 *Paige*, 197; *Bell* v. *Blount*, 4 *Hawk.* 384.

said Passaic river be restored to that condition that its usefulness be no longer impaired."

The cause was heard upon a motion for the allowance of an injunction, upon notice to the defendants and service of a copy of the information. Affidavits ex parte were taken by the parties and read upon the hearing.

Gifford and *Wall*, for the relators.

Williamson, for the defendants.

Cases cited for the relators. 3 *Kent's Com.* 432; 5 *Pick.* 492; 10 *Mod.* 382; 1 *Hals.* 1; 1 *Newl. Chan. Prac.* 217; 1 *Vesey*, 543; 1 *Fonb. Eq.* 267; 3 *Paige*, 567; 1 *Newl. Prac.* 219; 1 *Fonb. Eq.* 258; *Will. Eq. Pl.* 276; 1 *Mad.* 129; 18 *Vesey*, 211, 217; 1 *Vesey*, 188.

Cases cited for the defendants. 18 *Vesey*, 215; 1 *Mad.* 128; 10 *Mass.* 75.

THE CHANCELLOR. The title of this suit shows that it involves matters of public concern. The attorney general has presented a bill or information in the name of the state of New-Jersey, against the defendants, and charges them with being in the act of erecting a bridge over the Passaic river, which is a navigable stream, in such way as to interfere materially with the navigation; and calls upon this court, on the ground that such bridge will be, or is, a serious detriment to the community and a public nuisance, to interfere and prevent the further erection of the same, and also to order the same to be obviated and abated.

The information is of great length, and I will advert to only a few prominent parts of it. It sets out the act incorporating the New-Jersey Railroad and Transportation company; by which it appears that the company are to cross the Passaic and Hackensack rivers with their road, *contiguous to or south of* the bridges over those streams; and by which act it is directed, that

the said corporation may construct their railroad "across or upon any road or highway, stream of water or water-course, if the same be necessary; but the said corporation shall restore such road, highway or stream of water or water-course, to such state or condition as not to impair its usefulness: Provided always, that in case the said company shall deem it expedient to cross any navigable river with the said railroad, they shall be at liberty to erect and build a bridge for that purpose over the said river, with a draw therein of at least thirty feet width."

It charges, that the company first located their road through Broad street, so as to cross the Passaic near the old bridge; that they abandoned that route and located a new one, crossing the river a mile below the old bridge; that this being strongly opposed, they abandoned it, and resolved to place their bridge across the river at the north end of Moses Dodd's dock, with a draw in it of forty-five feet. That in July they commenced driving piles, when it was discovered that the part of the bridge intended for the draw measured only thirty-five feet, and was near the western abutment of the bridge. That a number of the owners of property above, applied to the directors on the subject, and gave notice that measures would be taken to prevent the draw from being constructed of such size. Public meetings were called, and finally a committee was appointed with instructions to pursue legal measures to prevent or remedy the evil.

The information then charges, that by the erection of the said bridge great mischief will ensue to the public; that it will be an irreparable injury, and is now an apparent public nuisance; that the erection of the bridge and draw in the manner in which they are now being constructed is contrary to express agreement, and that as early an application as practicable has been made for an injunction.

Some affidavits have been taken and read by both parties. Those of the relators go to sustain some of the principal allegations of the bill. Those of the defendants deny the fact charged, that the railroad was ever actually located through Broad street down to the old bridge, or on any other route than the one it now

tiffs. They state, that the piles are all driven, the superstructure raised, floors laid, rails laid for one track, and bridge fit for the passage of cars on the same; that there is a continuous track from the draw on the east side to Jersey City, and from the draw on the west side to Broad street in the town of Newark; that the construction of the slide was commenced about the middle of July last, it is now nearly ready for use, and no injury can result from the slide provided the same is removed from the opening. The impediment, if any, arises from the *size of the opening*, *not from the slide*. One witness states that the slide is completed with the exception of some fixtures, which may and probably will be appended to it in the course of another day. These affidavits also controvert the fact charged, that the draw is injurious to the navigation of the river.

This information is to prevent or abate a public nuisance, and the application now made is to prevent the alleged nuisance.

It would seem at first, incongruous and improper for this court to interfere in cases of public nuisance. The very fact that nuisances of that character are offences against the community, and necessarily savor of criminality in a greater or less degree, would seem to distinguish them as matters not proper to be dealt with by this court. But the jurisdiction of chancery, to a certain extent, in cases of public nuisance, appears to be admitted, although it has rarely been exercised. It is asserted by lord Hardwicke, in *Baines* v. *Baker*, *Amb.* 159; 3 *Atk.* 750; and is considered as existing by lord Eldon, in the case of the *Attorney General* v. *Cleaver*, 18 *Vesey*, 211. He speaks with caution upon the subject, as though it were new, but not disputed ground. Chancellor Kent, in *Attorney General* v. *the Utica Insurance Company*, 2 *John. Chan. R.* 371, appears rather to question the jurisdiction;* considering that the cases of purpresture which have

* "In regard to public nuisances, the jurisdiction of courts of equity seems to be of very ancient date; and has been distinctly traced back to the reign of queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights. In cases of public nuisances, properly so called, an indictment lies to abate them and

often occurred in the court of exchequer on the equity side, differ in some important particulars from a strict case of public nuisance. He seems to think that the case of *Baines* v. *Baker*, before lord Hardwicke, has been misunderstood. It was a bill filed by one individual against another, to stay building a hospital for people infected with the small pox, very near the houses of several tenants of the plaintiff. The court said, if it was a nuisance at all it was a public nuisance; that bills of that sort were founded on nuisances at common law, and if a public nuisance, it should be an information in the name of the attorney general, and then it would be for his consideration whether he would file such information or not. Chancellor Kent throws out a doubt whether it was not meant, that the attorney general might file an information in the king's bench. Such has not been held to be the meaning by English lawyers or courts, and it appears to me their construction is the right one.

The very fact, however, that there may be a doubt on the subject by intelligent jurists, should be sufficient to induce caution on the part of this court. In cases of public nuisance, there is an undisputed jurisdiction in the common law courts by indictment; and a court of equity ought not to interfere in a case of misdemeanor, when the object sought can be as well attained in the ordinary tribunals.

Admitting the jurisdiction, is there any thing in this case to warrant the interference of the court by way of injunction? In the view I take of the subject, I do not think it necessary to inquire whether there has been a violation of faith on the part of the defendants, or whether they have exceeded their powers, or exercised those granted to them in a wanton and oppressive manner. For from the case made by the bill and affidavits,

punish the offenders. But an injunction also lies in equity to redress the grievance by way of injunction." 2 *Story's Eq.* 201, 203. See also *Eden on Injunctions*, 157, 158, chap. xi; *Dewey on Injunctions*, 237; *Blakemore* v. *Glamorganshire Canal Co.* 1 *Mylne and K.* 154; 6 *Cond. Eng. Chan. R.* 558 *Attorney Gentral* v. *Burridge*, 10 *Price*, 350; *Attorney General* v. *Parmenter* 10 *Price*, 378. But see *Beveridge* v. *Lacey*, 3 *Randolph*, 63; *Charles Rive Bridge* v. *Warren Bridge*, 6 *Pick.* 376.

cannot avoid the conclusion, that the nuisance complained of in the information, and what it appears to be the object of the relators either to prevent or abate, is already there. The thing is done; and the application to this court, if not too late, would be unavailing even if granted. The nuisance complained of is the narrowness and position generally of the draw, or of the bent in which the draw is placed. The piles were driven long before the information was filed; and when the argument was heard before the court, the whole bridge was erected and finished, excepting probably a day's work to the slide, and the whole is now in use. The difficulty, as is stated in some of the affidavits, does not consist in the slide. No injury can result from that, provided it it removed at proper times, for the convenience of navigation. It is in the size of the opening between the piles, and that is not affected either one way or the other by the slide. Suppose, if any part of the slide still remain unfinished, an injunction were to issue, restraining the company from finishing it, or from using it as it is, in what way would the relators be benefitted? Would their difficulties, as regards the navigation of the river, be obviated in the least? Would they have less reason to complain than they have now? I do not perceive how such result could follow.

The injunction is a *preventive remedy*. It interposes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it cannot be applied correctively so as to remove it.

If the writ were to issue in this case, according to the prayer of the information, and the company were to be injoined from doing any more work on the draw or bent, and commanded to stop until the further order of the court, it might, and doubtless would operate as a punishment to them. It would prevent them from using their property and deriving any benefit from it, but it would afford no aid to the relators. Even if it were made perpetual, it would give them no relief. If it be said, that the company will by this means be induced to do what is believed by the complainants to be right, and widen their draw so as to do justice to the navigating interest; the answer is, that such is not

the legitimate object of the writ. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong.

This difficulty appears to have presented itself very early, and to have continued down to the time of presenting the information. The piles were driven, and the location and size and position of the draw fixed on in the month of June. In July, at a meeting where some of the relators were present, it was resolved that the bridge then erecting was a *public nuisance*, and ought to be *abated*. In the information, it is called an *apparent public nuisance;* and a part of the prayer is, that the nuisance be abated. One of the witnesses swears, that it is *now* a public nuisance. Of what possible benefit, then, can the injunction be, except to punish the party for an alleged abuse of power.

The relators insist, that they have made their application as soon as practicable; that they confided in the agreement of the company as to the width of the draw, and were deceived. Admitting this to be all true, it is not perceived that the case is varied. If the nuisance be erected before the party has time to prevent it, the only remedy is to have it abated; and whether it be accomplished by the deception of the party or by other means, the province of the court remains the same.

If the relators shall seek to abate the alleged nuisance, the proper course, as it appears to the court, is by indictment at common law. The fact, whether it be a nuisance or not, is proper to be tried by jury, whether the proceeding be in this court or elsewhere; and it would seem as though the common law courts were the more appropriate tribunals for all matters of this character.

The application for an injunction is denied, with costs.

THOMAS DIEHL and others v. JOHN PAGE and others.

On a bill filed to avoid a title as fraudulent, if it appear that the complainants have no title, they will not be permitted to impeach the title of the defendants.

*The judgment of a court of common pleas, rendered in a proceeding by attachment against an absent or absconding debtor, though irregular and not pursuant to the statute, is not *void*, and cannot be impeached collaterally.

The court has a general jurisdiction over the whole subject matter; and although it acted under the requisitions of a particular statute, and not according to the course of the common law, it is not thereby degraded into a court of such inferior and limited jurisdiction as that all its proceedings while acting within its jurisdiction, are rendered void if a single requisition of the statute be not complied with.

A party who purchases from one not in possession of the bargained premises, cannot claim to be a bona fide purchaser without notice; for possession in another is notice sufficient to put the party on enquiry.

THE bill was filed by parties claiming title under a sheriff's sale, made by virtue of a judgment rendered on an attachment against an absent debtor, to avoid a conveyance made by the debtor previous to the issuing of the writ of attachment, and also a subsequent conveyance from the grantee of the debtor, as fraudulent. The facts relied upon to sustain the charge of fraud, appear in the chancellor's opinion. Answers were filed by the defendant in attachment, the original grantor, and also by the parties claiming title under his grantee at the time of filing the bill. The cause was heard upon the pleadings and proofs.

Jeffers, for complainants.

Eakin and *Williamson*, for defendants.

Cases cited for the complainants. 3 *John. Chan. R.* 275; 4 *Ibid*, 85, 92; 6 *Ibid*, 235; 7 *Ibid*, 174, 182.

Cases cited for the defendants. 6 *Bac. Ab.* "*Statute*;" 5 *Halsted*, 250; 12 *Vesey*, 324; 3 *Ves. and B.* 42.

* See *Pittenger's Adm'r* v. *Pittenger*, post.

[Diehl et al. v. Page et al.]

THE CHANCELLOR. Thomas Diehl and one William Guier, in the year 1818, obtained a judgment in the supreme court of Pennsylvania, against John Page, for one thousand eight hundred and ninety-five dollars and sixty-two cents. The judgment remaining unsatisfied, and Page having afterwards acquired title to the undivided moiety of a plantation in the county of Salem, they sued out an attachment from the court of common pleas of that county, against Page, as a non-resident debtor, returnable to the term of March, 1826, and thereby attached the said property and the rents of it, in the hands of Thomas Wright and Peter Wright, the tenants and two of the defendants. Such proceedings were then had in the attachment, as that in the term of September, 1826, judgment was rendered in favor of the plaintiffs for three thousand and forty-nine dollars and twelve and a half cents, besides costs. The auditors sold the property on the twentieth of December, and it was purchased by Thomas Diehl and William Guier, for one thousand nine hundred and ninety-nine dollars; upon which the auditors made them a deed.

After stating the foregoing facts, the bill proceeds to state, in substance, that Page, knowing that his interest in the premises was about to be attached by the complainants, fraudulently and without consideration, executed a deed of conveyance to one Isaac H. Booth, for all his interest; which deed bears date on the fourth day of June, that being about the time that Page obtained possession of the property under a judgment at law.

It further charges, that Booth is a very poor man, and in the lowest walks of life; that he is not and never was possessed of any property, and earns his living by daily labor as a journeyman comb-maker, and sometimes as a common and day laborer about the city of Philadelphia, and was induced to lend his name by the promise of reward. That there was no money paid, nor was Booth able to pay any. That after the pretended conveyance, Page, with the knowledge of Booth, made a contract with Wright the tenant, and held himself out as the real owner of the premises, offered to sell and mortgage them to raise money, and exercised ownership over them in as full and absolute a manner as

he ever had done. That afterwards, the said Page made another pretended sale of the property to Samuel C. Atkinson, of Philadelphia, and one Champion Clark, of Gloucester county, who now pretend to claim the same by virtue of a deed from Booth and wife, dated June first, 1829, for the alleged consideration of four thousand seven hundred and fifty dollars; that no money was paid, but Clark and Atkinson gave a mortgage to Booth for four thousand seven hundred and fifty dollars; all of which transactions were fraudulent, and brought about by the procurement of Page.

William Guier having departed this life, his interest has become vested in his son, William Guier, and his daughter, Mary Ann, now the wife of William Kennedy, who, with Thomas Diehl, are the complainants in this suit.

The bill prays, that all the conveyances above mentioned from Page and his assignees, may be declared fraudulent and void and be set aside, and that the tenant may come to an account for the rents, &c.

John Page, in his answer, admits the issuing of the attachment, and that the property in question was seized on and sold, but insists, that the proceedings in the attachment were irregular; that there was no legal advertisement either of the issuing of the writ, or of the sale of the property, and that the judgment and conveyance founded on it are wholly inoperative and void. He denies that the conveyance to Booth was fraudulent, and insists that it was bona fide, and that he gave a warranty deed, which he would not have done if the said deed had been fraudulent. He answers nothing as to the pecuniary circumstances of Booth, but says he was of respectable character and standing, a combmaker in Philadelphia; that he was desirous of changing his business for one of a more active nature, and knowing of this property which he, Page, had recovered in New-Jersey, he, after viewing it, proposed to purchase it, and agreed to give four thousand dollars for it, which was supposed could easily be made by a person going thereon and felling timber and wood; and having confidence in Booth's honesty, he sold it to him, believing he would

be able to pay by instalments or otherwise. Page further denies that he ever offered it for sale after the sale to Booth, or exercised any acts of ownership over it.

Clark and Atkinson, in their answer, set up the same defence as Page, in relation to the attachment and the proceedings under it, insisting that they are void. They deny any knowledge of fraud as between Booth and Page, and allege, that believing the value of the property to be considerable, they purchased it of Booth by deed dated June first, 1829, for the bona fide consideration of four thousand seven hundred and fifty dollars; and to secure the payment of the same, they gave him a mortgage on the property, (for what amount is not mentioned.) That the said Booth sold the property because the rents and profits were lying dead and unproductive, and because he was unable to use the property.

Booth and wife have put in no answer, and that of Peter and Thomas Wright, the tenants, is merely formal.

Considerable testimony has been taken by the complainants, to sustain the charge of fraud as made in the bill; but it is necessary, in the first place, to take up and dispose of the first ground of defence assumed by the defendants; that questions the right of the complainants to come into court and set up any claim whatever to the property. It insists that the judgment on which their title is founded, and the conveyance under which they held it, are both irregular and void, and that no valid claim can be exerted under them or either of them. If this be so, it will be unnecessary to consider the question of fraud; for if the complainants have no title, they cannot be permitted to impeach that of the defendants.

Taking the defendants' evidence as admissible, there would seem to be much irregularity in the proceedings under the attachment. There were two suits instituted, one of which was continued to judgment, and the other ceased soon after the return of the writ. One of them was in the name of Diehl alone, the other in the names of Guier and Diehl. The notice of issuing the attachment appears to have been in the first, and not in the

second suit, and it is doubtful whether the publication was continued for the period of time prescribed by the statute. These matters do not, however, appear upon the record, which I apprehend is the proper instrument to govern the court. But even the record as made out is defective, in my judgment, and before a tribunal lawfully charged with the correction of errors, I think it might have been set aside.

This, however, is not the question. We are not to inquire whether the judgment is erroneous and irregular, but whether it is void, and, coming up collaterally before this court, is to be taken as a nullity. On this question there ought to be no doubt. The jurisdiction of the court which rendered the judgment was complete. It was a general jurisdiction over the whole subject matter; and while acting within that jurisdiction, their judgments are not to be impeached, though erroneous on the face of them. The court of common pleas did not in this case, it is true, proceed according to the course of the common law; it acted under the requisitions of a particular statute; but the principle is not thereby altered. It is not thereby degraded into a court of such inferior and limited jurisdiction, as that all its proceedings are rendered void, if a single requisition of the statute be uncomplied with. Case of the *Marshalsea*, 10 *Coke*, 76. *Kemper's lessee* v. *Kennedy et al.*, 5 *Cranch*, 173, is a strong case to show the distinction between what is technically called in the English books a court of limited and inferior jurisdiction, and a court invested by statute with a new and general jurisdiction over any particular subject matter committed to its cognizance. The several courts of common pleas of this state, having no criminal jurisdiction by their original constitution, were by an act of the legislature invested with power to render judgment upon inquisitions taken and found in cases of treason. In the proceeding and judgment brought up collaterally in that case, the court said, the judgment was clearly erroneous; but the court of common pleas being a court of record, and having general jurisdiction of the subject matter, its judgment could not be diregarded. It must stand until reversed.

In *Den ex. Dem. Flomerfelt* v. *Zellers*, 2 *Hals.* 153, the court sustained a judgment upon a bond and warrant of attorney, under the act regulating such proceedings, although scarcely a single requirement of the act had been complied with, on the ground that the judge had cognizance of the subject matter, and the judgment, though voidable, could not be collaterally impeached and considered as a nullity. See also *Shottenkirk et al.* v. *Wheeler et al.*, 3 *John. Chan. R.* 275; *De Riemer et al.* v. *Cantillon et al.*, 4 *John. Chan. R.* 85. Indeed the principle is so well settled, as scarcely to need authority to support it. It is a safe one for purchasers, and is just and equitable in all its results.

The defendants' counsel endeavored to maintain, that this judgment might be impeached on the ground of fraud; that it was a fraud upon the court and the party. There can be no doubt that a record may be affected and even vitiated by fraud. The cases from 12 *Vesey*, 324, (*White* v. *Hall*,) and 3 *Ves. and Bea.* 42, (*Hampson* v. *Hampson*,) fully prove the position, if it needed proof. But in both these cases the question of fraud was distinctly raised, and the issue was upon that point. It did not come up collaterally, as in the present case. But waiving this difficulty, I am not satisfied that there is fraud in the judgment. There is no pretence that the money was not due, or that the judgment was entered for too large a sum, or that any deception was practised on the defendants. If there was any thing like fraud, it must be a legal fraud, arising by implication from the irregularity of the proceedings. This would prove too much; for every irregularity might be considered as operating fraudulently in some sense, by depriving the party of some legal right or privilege. Nor does the fact that the attachment is a proceeding *in rem*, in which there is no personal notice, vary the matter. It is still nothing more than an irregularity, and must submit to be governed by the same unbending principle that governs all cases of the like nature.

The objection to the deed or conveyance, which is the next obstacle interposed against the complainants' claim, is, that the

auditors, in giving notice of the sale, mistook the name of one of the plaintiffs in attachment, and published it *Grier*, instead of *Guier*. I cannot consider this trifling inaccuracy, in a matter not material, sufficient to invalidate a title formed upon a sale, that appears to have been altogether fair and bona fide. If the mistake had been in the name of the defendant, it would have been more important, for then he might have been deceived and others also. If it had been in the description of the property, or the time or place of sale, it might have operated an injury, by misleading those who wished to purchase; but it is not perceived how the mistake of a single letter in the name of one of the plaintiffs, could have been attended with any evil consequences. In *Den* v. *Zellers*, 2 *Hals.* 153, the court held, that a small variance or inaccuracy in the description of the premises, should not impeach a sheriff's sale, when it appeared from the description that it must have been fully understood what property was to be sold.

Upon the whole, I am satisfied that this preliminary objection is unsound, and interposes no obstacle to the investigation of the question of fraud charged against the defendants, and which is directly put in issue by the pleadings.

Was, then, the conveyance from Page to Booth, a fraudulent and covinous conveyance, designed to defeat the rights of creditors?

In answering this inquiry, it is proper to look first to the answer of the defendant, Page. He was interrogated specifically on this point, and his response, if direct, positive and full, is entitled to much weight. The answer of Page as to this part of the case, is very far from being satisfactory. Some of the charges in the bill are not answered at all, others are evaded, while others again are answered according to the letter and not the spirit of the charge or interrogation. Some parts of it are argumentative and irrelevant, and taking the whole of it together, it is not entitled to that position which a plain, open and cordial answer may always claim in a court of justice. Looking at it in the most favorable light, it presents a suspicious case; one not easy to be

reconciled with a fair and bona fide transaction. Without going into a minute dissection of it, which would be tedious and is unnecessary, I shall proceed to the facts of the case, as they are exhibited by the evidence.

It appears that Guier and Diehl, in the year 1818, recovered a judgment in the city of Philadelphia against John Page. This was revived by scire facias in 1824, and an execution issued against his goods and chattels and lands, which was returned by the sheriff "*nulla bona*." In the spring of 1825, Page came into possession of the property in question, by the judgment of law. Before this, Booth and Page were acquainted. Booth was a tenant of Joshua Longstreth in Philadelphia, and he is stated by him in his evidence to have been poor; insomuch that he left the house he occupied without the knowledge of his landlord, and without paying the rent. Page called on Longstreth as the friend of Booth, and begged him not to be hard with him, representing him as *very poor*, and *without the means of supporting his family*. Longstreth sued Booth, and in 1823 obtained a judgment for thirty-five dollars, and Page became his bail. In 1824 he took the benefit of the insolvent laws. By the schedule of his property and debts, as filed, it appears that his debts amounted in the whole to seventy-four dollars, and that the whole number of his creditors was three, of whom Longstreth was one; and also that he had neither real or personal property. Longstreth further testifies, that he saw Page frequently for several years afterwards, and that he always represented Booth as poor and unable to pay. These facts are undisputed. Part of them are proved by record evidence. And yet this is the man to whom Page, in June, 1825, only a year after he took the benefit of the insolvent laws, and while he was representing him so poor as to be unable to support his family, conveyed this valuable property, worth at least two thousand dollars. The very statement is sufficient to excite surprize and suspicion. But the subsequent part of the transaction is still more surprizing. Page conveyed the property for the sum of two thousand dollars, on the fourth of June, 1825, and took Booth's own bond for the

purchase money, payable the same day, with interest. Such is the statement of the answer, and Page cannot dispute his own admissions. There was no money paid, no mortgage given, no judgment bond, no security of any kind taken. And even the bond which is alleged to have been taken by Page, and which must have been in his possession, is not produced or made evidence before the court. The transaction carries on the face of it strong marks of fraud, and needs explanation; and the more so, as Page himself does not appear to have been a man of visible property; for it was in 1824 that the sheriff of the county of Philadelphia returned the execution against him *nulla bona*.

How is it attempted to be explained? Page, without answering a word as to the poverty of Booth, says, he was a comb-maker in the city, "of a respectable character and of reputable standing; but the business of comb-making not agreeing with his health, and being desirous of changing his business for one of a more active nature, and knowing of this property that the defendant had recovered in New-Jersey, he proposed to purchase the same, and after going to the premises and viewing the same, he agreed to give this defendant four thousand dollars for the same, which was supposed could be easily made by a person going thereon and felling timber and wood;" that he had full confidence in the integrity of Booth, and believed he would be enabled to pay him by instalments, *or otherwise*. That Booth was not a common day laborer; that he believes the sole reason why Booth has not paid the consideration money is, that he has been prevented from going on the premises and realizing the profits to be derived therefrom by the sale of timber and wood and otherwise; and that if Booth is now in the reduced circumstances in which the complainants represent him to be, it may be attributed to their proceedings.

Such is the account of Page himself; and in my opinion it is entirely unsatisfactory. It is difficult to believe that Page could have been so silly and ignorant of business, as to convey this property to a man not worth a cent, an artisan entirely unacquainted with the management of a farm, and rely on being

paid by the produce of timber and wood to be cut off the property. He does not show that there was a surplus of timber that might have been appropriated to the payment of the purchase money, without injury to the farm; or that, taking the whole of it together, there was enough for that purpose. It rather serves to show, that Booth was merely the agent and servant of his friend, Page; and that he lent himself to a fraudulent transaction for the purpose of serving him.

This is confirmed by the testimony of Peter Wright, who says that Page, in conversation with him soon after he got possession of the property, observed that he thought it was best for him to sell it as quick as he could, or as soon as he could after he got possession of it, for fear his creditors would come on him and take it from him, or words to that effect. This explains the matter more satisfactorily than the answer, and furnishes a key to the whole mystery. He also told Thomas Wright, that if he, Page, did not sell the property, other people would sell it from him.

In addition to this, it appears that after the alleged sale to Booth, Page exercised acts of ownership over it, offered to sell it, and in all respects treated it as his own. According to the testimony of Thomas Wright, the tenant, Page called on him in the forepart of the year 1825, to let him know he had recovered a moiety of the property on which he, Wright, then lived. The other half belonged to Jemima and Rebecca Bullock. In October, 1825, Jemima Bullock and Wright called on Page, in Philadelphia, respecting the rent of the farm. The object of calling was to fix the rent, and there was then an agreement made between them, that is to say, Jemima Bullock, Page and Wright, for the rent; and it was fixed at four hundred and fifty dollars per annum, and was to continue till the expiration of the lease. At this interview, which was four months after the alleged sale, not a word was said about the sale. The tenant expected to pay half the rent to Page, as a matter of course, and the other half to the Bullocks. But again, at this meeting Page insisted on Jemima Bullock's purchasing his half of the farm.

He asked five thousand dollars for it, and urged her to take it. Why this, if the property was already sold and in the hands of a bona fide purchaser. This, it will be observed, was before the service of the attachment, and while the property was in the hands of Booth, who, according to the answer of Page, expected shortly to remove upon it, and make the price of it by cutting the wood and timber from it. If Booth had been an honest purchaser, and the actual owner, would Page have undertaken thus to deal with the property of another man? Surely he could claim no such right under his warranty, however general; and the power of attorney does not appear to have been thought of till long afterwards.

It is not till after the service of the attachment that any thing is heard about the sale of the property. Then, when the tenant told him that the farm and all the moneys due him were attached, and not before, he told the tenant he had sold the farm. He told the tenant to come to him with the rent, and he would take him to Booth, the person who had bought the farm. The tenant asked where Booth lived, but Page did not tell him. In the spring Page and Booth came for the purpose of collecting the rent; but Page was the principal and acting man in the business, and appeared to have more interest in it than Booth.

I think the evidence shows clearly, that there was a perfect understanding between Page and Booth, and that the one was in fact but the representative of the other; that the whole formula of sale was a mere cover, and designed to protect the property.

Page, it is true, affirms that he at no time exercised any acts of ownership over the property after the sale; nor, as the real owner of the said premises, did he make any contract or offer of sale of the same, by mortgage or otherwise, for himself or in his own name. But this is contradicted, as has been seen, by the testimony of Thomas Wright. And if any thing more is necessary to overcome this part of the answer, it is furnished by the evidence of John Tufts; who says that about three years ago, John Page offered to sell the property to him, and made him sub-

sequent offers of the same character within two years. He told him that the suit of Guier and Diehl would be settled, and he would make him a good title to the property. Mr. Tufts states in addition, that the day before the examination, in talking upon the subject with Page, he, Page, told him he made him those offers under a power of attorney from Booth. But Tufts states explicitly, that he never heard until that time of a power of attorney. There is something remarkable in this circumstance. Tufts swears that all these conversations were within three years; that is, not longer back than July, 1831. John Page is seen pressing the witness to purchase the property, offering to make a good title for it, and representing it, by necessary implication at least, as his own. Now he insists that he acted in that matter under a power of attorney from Booth, and that by virtue of that authority he made the offer. Yet when we come to look at the evidence, it is seen, that as early as June, 1829, (two years before,) Booth had made a conveyance of all his interest to Atkinson and Clark, and an exemplification of the deed is actually produced by the complainants; and there is reason to believe that Page knew this, for he told Wright, the tenant, that Booth had sold the property to Clark and Atkinson.

So far as Page and Booth are concerned, it is unnecessary to spend further time in investigating the testimony. It is a clear case of fraud, badly concerted and clumsily executed, and against the consequences of which it is the duty of the court to protect those having lawful rights. As to the other defendants, Clark and Atkinson, their situation is no better. If not actual parties to the fraud, they hold under a fraudulent title. They are not bona fide purchasers for a valuable consideration, and without notice. They have not pretended to set up any such defence. Nor could they have done it with truth; for when they purchased the property it was in possession of Page, and not of Booth; and possession is notice sufficient to put the party on inquiry. The answer of these defendants is very like that of Page, and obnoxious to the same remarks. It shows that no money passed at the time of the purchase; and sets up that they agreed to give

four thousand seven hundred and fifty dollars, and to secure it they gave a mortgage for the whole. They undertake to assign a reason for the purchase, and it is as follows:—"These defendants further answering, say, that the rents due by the tenant, and the issues and profits of the said premises, lying dead and unproductive, and the said Isaac H. Booth not being able to go upon the premises by reason of the proceedings of the said Thomas Diehl and his confederates, the said Booth sold and conveyed the said premises to these defendants; and by reason of such their proceedings at law and equity, the rents, issues and profits of the said premises are unproductive and withheld, and which tends to the manifest wrong, injury and detriment of these defendants."

This appears to me a singular reason for the purchase, but not more so than all the proceedings in this extraordinary case. These defendants had parted with all their interest to Robert Leeds, long before this answer put in, and yet no mention is made of it. They answer as though they still claimed the property, and the rents and profits of it.

Leeds has been examined as a witness. He agreed to purchase of Champion Clark and Keziah Clark, who owned the whole of the moiety, for two thousand seven hundred dollars, and was besides to settle with an old gentleman in Philadelphia, who would, as Mr. Clark said, be very easy to be treated with. This old gentleman turned out to be John Page. Page said the bond and mortgage were transferred; and said, "Clark, you know when the mortgage was given, and for what sum." The principal and interest amounted to about six thousand dollars. This must have been the bond and mortgage given by Clark and Atkinson to Booth, and which had come into Page's hands; showing still that Booth was merely the agent of Page. Page said, he had received bonds and mortgages on the property, and had a power of attorney from another person, and that under that power he had control of the property. Of this there can be no doubt. And I think it plain from the whole case, that he has the control

of it still. Not a dollar has ever been paid by any one of the purchasers, nor was it intended that any should be paid.

It is not a pleasant duty to set aside conveyances on the ground of fraud; but when justice requires it, it should be done without hesitation. In the case before me, I cannot doubt; and I shall therefore order the conveyances from Page to Booth, and from Booth to Clark and Atkinson, to be set aside and annulled, as fraudulent and without consideration, and therefore void as against these complainants.

Decree accordingly.

GEORGE MAXWELL and RACHEL his wife, late RACHEL PITTENGER, Adm'rs of ABRAHAM PITTENGER, dec'd, v. MARGARET PITTENGER, Adm'x of CORNELIUS PITTENGER, dec'd, and others, his heirs at law.

A decree for the specific performance of a contract will not be refused on the ground that the purchaser was intoxicated at the time of the sale, unless it appear that such intoxication was produced or procured by the vendor, or that an undue advantage had been taken of the situation of the purchaser.

If the vendor is ready at the time appointed to perform his part of the contract, and offers to do it, it is sufficient.

If a deed is to be given, and the vendor is present prepared to sign it, and the one who is to receive it positively declines, there is no need of a formal execution and tender.

* A decree of the orphans' court, ordering an administrator to sell the whole or so much of the lands of the intestate as will be sufficient to pay the debts, will be reversed as erroneous and unlawful. But such decree cannot be impeached collaterally, or treated as a nullity.

THE bill in this cause was filed to enforce the specific performance of a contract for the purchase of certain real estate, sold at public sale by the administratrix of Abraham Pittenger, deceased, by virtue of an order of the orphans' court of the

* See *Diehl et al.* v. *Page et al.*, ante, 142.

county of Somerset, and purchased by Cornelius Pittenger in his life time. The purchaser refused to accept the title or to pay the purchase money. An answer was filed by the administratrix, admitting the sale, but insisting that it was illegal and fraudulent. The particular grounds of defence appear in the opinion of the chancellor.

The cause came on for hearing upon the pleadings and proofs.

Wall, for complainants.

J. S. Green, for defendants.

Cases cited by the defendants' counsel. 3 *Atkyns*, 389; 13 *Vesey*, 25; 1 *Vernon*, 227; *Prec. in Chan.* 538; 1 *Vesey*, 565; *Wilmurt* v. *Morgan*, (*Opin. of Ch. Williamson*,) cited in 4 *Halsted*, 341; 6 *Halsted*, 344; *Rev. Laws*, 435, sec. 19, 20; *Hals. Dig.* 248; 18 *Vesey*, 13, *note*; 18 *Vesey*, 12; 6 *T. R.* 642; *Cowper*, 395.

The Chancellor. In the term of May, 1827, the orphans' court of the county of Hunterdon, granted to Rachel Pittenger, administratrix of the estate of her late husband, Abraham Pittenger, an order to sell certain real estate in the county of Hunterdon, for the payment of debts; and in the term of June of the same year, the orphan's court of the county of Somerset granted to her a similar order, to sell real estate in that county. By virtue of these several orders, she advertised, and on the twenty-seventh day of September, 1827, sold to Cornelius Pittenger the undivided right of a certain farm lying in Hunterdon and Somerset, then in possession of the said Cornelius Pittenger, for the sum of nine hundred dollars. The purchaser on the same day signed a note or memorandum in writing, acknowledging the purchase, and soon after, and before the time for paying the purchase money and executing the deed, departed this life, intestate. The bill is filed against the administratrix and the heirs at law, for a specific performance.

The defendant, Margaret Pittenger, has put in an answer to the bill, admitting the sale, but denying that it was fair, legal or binding; and insisting that the said Rachel Pittenger, one of the complainants, and her agents, practised a fraud upon the said Cornelius Pittenger, by giving and suffering to be given to him spirituous and other strong liquors, so as to produce intoxication, and thereby rendering him unable to understand the nature of the conditions of sale; that he purchased the property, as defendant believes, free from all legal incumbrances and the widow's right of dower, and under that impression signed the article or memorandum acknowledging the sale. She sets up further in the answer, that the complainants employed one or more persons as puffers to bid for the property, without declaring that she did so, thereby practising a fraud upon the purchaser, and compelling him to give more than the property was worth, even if clear of incumbrances.

From this analysis of the answer, it appears that the defendant seeks to avoid the contract, in the first place, on the ground of fraud practised by the vendor in giving and suffering to be given spirituous and other strong liquors to the purchaser, so as to produce intoxication, by which he was rendered unable to understand the conditions of sale.

The allegations of the defendant, in this behalf, are not sustained by the proof.

Whether or not Cornelius Pittenger, the purchaser, was, at the time of the sale, so far under the influence of liquor, as not to be able to act understandingly and correctly, has been made a question, and there is considerable evidence on both sides. One of the defendant's witnesses states, that Pittenger, during the vendue, drank freely of what he believes was cider spirits, and was very much intoxicated when the property was struck off. Another one testifies, that he also saw him drink during the sale, and that he was so much in liquor as to be stupid, and did not appear to do any thing correctly; that when he signed the acknowledgment on the conditions of sale, he was so much under the influence of liquor that any one might have taken the advan-

tage of him. A third witness, supposed him to be a good deal worse for liquor while bidding; thought he was not fit to bid, and that he did not know what he was about. A fourth, testifies to his having been at a distillery in the morning of the day of sale; that he was as much in liquor when he went away to go to the vendue, as witness ever saw him, and that he took with him two jugs containing three quarts of liquor. On his cross-examination he said, he thought any one could have told he was in liquor when he left the distillery. He could not go very straight.

On the part of the complainants it is proved, that Pittenger came to the house of the complainant, where the vendue was to be held, before dinner, and dined with those who were there; and one of the complainant's witnesses says he was sober, and, as witness considered, perfectly capable of transacting business. Another witness says, that Pittenger appeared to understand, and, no doubt, did understand what he was about; that he was sufficiently sober to understand himself perfectly. Witness would have had no hesitation in doing business with him at that time. *Andrew Weart*, another witness of the complainant, and the crier of the vendue, says, Pittenger was a man of intemperate habits; that when witness first came to the sale, he considered Pittenger as regular as he generally was. He saw him drink nothing during the sale. He further states as follows:—"After the sale, and when Cornelius signed the conditions, he appeared to me to be as regular as he had been during the sale. For my part, I did not see any alteration in him; at that time he was as cautious and as capable of doing business as at any time, as I thought, and as far as I could see. Several weeks after that, he came to me to do some business with me, and was capable of doing business, and did it with me very correctly; and he was as capable of doing business at the sale as he was then. I should have had myself no hesitation to make a contract with him in the condition in which he was at the sale."

I think it evident from the testimony, that Pittenger had been drinking, and perhaps drinking freely; but that he was in such

a situation as to be unable to act understandingly, is not satisfactorily made out. The witnesses differ in opinion; but the facts of the case, as extracted from the testimony generally, are against the proposition. For instance, Pittenger came to the sale with the view of purchasing the property. It was an undivided moiety that was to be sold, and he owned the other part of it. Before the sale commenced, and when Mr. Maxwell proposed that the property should be sold without written conditions, and an article of agreement signed afterwards, he, Pittenger, objected to it. He wanted to know how, and what he was to buy. During the sale, he bid cautiously and deliberately; more so, the crier thought, than others. After the sale, and before signing the memorandum on the back of the conditions, he attended to the reading of it; and not satisfied with that, he asked Mr. Maxwell for his spectacles, and read it for himself. He made no objection to the subscription or the purchase. When Mr. Schenck, after the sale, offered to take it off his hands, he declined, and said he bought it for himself, and that he meant to keep it. He said it suited him better than any body else, as he owned one half of the property. He said a family might come in, that would give a good deal of difficulty, and it was best to own it himself. After the business was completed, he took tea with the family, in company with George Maxwell and William Collings, who both testify to his capacity. After tea, he started to walk home, and being overtaken by Thomas Allen, who was in a wagon, he stopped him, got into his wagon, and rode home; then got out without any assistance, and walked into the house.

These facts, taken together, show that Pittenger, throughout the whole, acted as a sober, rational and intelligent man would act. And when, in addition to this, it is seen that no evidence is adduced to prove that he gave more for the property than its value, the fair conclusion is that he acted understandingly, and that, even if he had indulged pretty freely in the use of ardent spirits, he was competent for business.

It is satisfactory to reach this result, though it was not necessary to sustain the plaintiffs' claim. For if the defendant had been

able to prove conclusively that the purchaser was intoxicated, it would not have avoided the sale, unless the defendant could have shown that such intoxication was produced or procured by the complainant, or that an undue advantage had been taken of his situation. This principle, which was first adopted, substantially, by lord Hardwicke in 1747, has been recognized in the English chancery in later cases; as for instance, by lord Eldon in *Cooke* v. *Clayworth*, 18 *Vesey*, 12; and was adopted in this court in the case of the *Adm'rs of Wilmurt* v. *Morgan*, decided by chancellor Williamson in March, 1827, and in the later case of *Crane* v. *Conklin et al.*, decided in October term, 1831, *Saxton*, 346.

Even the defendant in her answer, does not claim to avoid the contract simply on the ground of intoxication, but because the intoxication was procured and caused by the design of the complainant; thereby acknowledging the correctness of the principle now laid down.

Supposing, however, that the conclusion arrived at is incorrect, and that Pittenger was really so much intoxicated on the day of sale, and at the time of the sale, as not to be able to act understandingly; then it is incumbent on the defendant to make out, either that such intoxication was procured or induced by the complainant, or that some improper advantage was taken of the defendant while in that situation. As to the first, the evidence is entirely insufficient. One or two of the witnesses for the defendant have sworn that there was ardent spirits on a table, and that Cornelius Pittenger drank of it. I incline to think they are correct; but it does not appear to have been the table in the room where the sale was going on. William Collings puts that matter beyond all dispute; for he states that he was in that room the whole time, with the exception of a few minutes, and there was no spirits there. I have no doubt, if liquor was actually used before the close of the sale, it was that brought by Pittenger from the distillery, as mentioned by Mr. Drake; and that it was used without the knowledge or consent, and of course without the procurement of the complainant. The evidence is full to show that

she gave none till the sale, and all business connected with it, was entirely over.

Was there any advantage taken of the situation of the purchaser, supposing him to have been intoxicated? As has been already remarked, it is not pretended that the bargain is unconscionable, or that he gave in any way too much. The property, it is admitted, suited him better than it did any one else, and was not only convenient, but in a measure necessary to the comfortable enjoyment of that part of it which he already owned. So far, then, as the price is material, there does not appear to be any valid objection to it.

But it is contended, that the purchaser was deceived as to the conditions of the sale, and that he supposed he was purchasing the property free from all incumbrances; whereas, it would appear by the articles of sale to have been purchased subject to the widow's dower, and all other legal incumbrances. Let us look into the evidence on this part of the case, and see how far the allegation is sustained. If the charge be true, the complainant can receive no countenance in this court, but must be left to her remedy in a court of law.

Foster Walters, a witness of defendant, says he heard the conditions of sale read by Mr. Maxwell. He was not so hard of hearing then as when examined, and heard them perfectly, and did not understand that the right of dower was in the conditions when they were read. He was by when Pittenger signed the indorsement on the back of the conditions of sale, and does not think any part of the conditions was read to him at that time.

Albert Terhune, another of defendant's witnesses, says he was present when Pittenger signed the memorandum, after the sale, but does not recollect that the conditions were read to Pittenger. The witness did not get to the sale until after it commenced, and he did not hear the conditions read at any time.

Another of the defendant's witnesses, John Savidge, says he perfectly understood that the part of the property which was struck off to William Collings, was sold subject to the widow's right of dower and to all incumbrances, but he "*believes he had*

an idea" that the property in dispute was sold under different incumbrances from the property that was struck off to William Collings. Upon his cross-examination he was asked this question, Did you not tell him (Cornelius) that the property was sold subject to her (the widow's) dower right? To which he answered, I think it likely I did tell him so, for I understood it so, as that was the talk generally in the neighborhood at that time.

Such is the substance of the evidence to substantiate a grave charge of fraud against the complainant. It receives no aid from the answer, for the defendant cannot speak on this subject of her own knowledge. If it were uncontradicted or unexplained, it would scarcely be sufficient to establish so serious an allegation. But the testimony of the complainant is conclusive to show that there was not, and could not have been, any thing like fraud or deception practised.

In the first place, the articles or conditions of sale were very explicit on the subject, stating that the property was sold subject to all legal incumbrances and the widow's dower. These conditions, although not fastened up to the door, as is usual and proper, were publicly read in the presence of those who were there, and especially of Cornelius Pittenger, and were then laid on the table in the room where the people principally were.

Andrew Weart, the crier, testifies, that while he was crying the sale, he mentioned frequently that the property was subject to incumbrances; perhaps oftener than usual, that the people might understand it. He named the widow's dower and all legal incumbrances over and over. He has no doubt on his mind that Cornelius heard the conditions read, and that he also read them himself; for he (Cornelius) took them up and asked Mr. Maxwell for his spectacles, and was looking over them. He read them while the sale was going on.

William Collings, another witness of the complainant, says that Cornelius joined with Foster Waters, esquire, in insisting that there should be written conditions of sale; and he saw Cornelius examining them after they were read. The crier repeatedly stated the conditions of the sale; more frequently, I thought,

than necessary. He named the widow's dower, and all legal incumbrances.

Again: It appears by the testimony of George Maxwell, not only that Cornelius heard the conditions read, but that he insisted on having written articles, saying, he had come to buy the property, and he wished to know what he was about; but also, that next morning after the sale, he came and asked to see the conditions, and after reading them and hearing them read, he said he was satisfied with the whole of them, only he had been told that when the widow died her children would get the dower, and he wanted to know about that. After getting the opinion of witness on that point, he said he was perfectly satisfied if that was to come to him after her death. It appears, also, that he was, before his death, in treaty with the widow for her right. Maxwell further testifies, that on the day of sale, Foster Waters wanted him to get the widow to give up her thirds: he said he thought it would sell better if there was a clear title.

This evidence places the matter beyond dispute, that so far as regards the conditions of sale, there was no fraud or deception. They were openly and repeatedly proclaimed, and could not have been mistaken.

Besides, this was an administrator's sale under an order of the orphans' court. All that could legally be sold under the order, was the right of the intestate, not the widow's dower. That remained unaffected by the order or the sale, and if nothing had been said in the conditions about incumbrances of any kind, it would be fair to presume that the purchaser would understand the sale to be subject to all legal incumbrances, unless there was some distinct and positive stipulation to the contrary.

Another ground of defence set up in the answer is, that the complainant employed puffers at the sale to run up the property, without the knowledge of the defendant. This allegation is so perfectly unsustained by testimony, that it is unnecessary to bestow upon it any consideration.

So far, then, as relates to the sale, the case is free from difficulty. It appears to have been fair, open and bona fide. The

consideration was a reasonable one, and the property suited to the wants and condition of the purchaser.

No difficulty is made about the tender of the deed in proper season. Some evidence was taken to show that it was not executed at the time by the grantor; but as the counsel of the defendant has not in his brief adverted to it, I presume it was not intended to be urged. Whether the deed was actually executed or not, is not, in the view of the court, material. Mrs. Pittenger, on the first day of April after the sale, at which day the purchase money was to be paid and the deed delivered, went to the dwelling of Cornelius Pittenger to tender the deed. She produced the instrument, and handed it to Pittenger, who took it and read it, and afterwards handed it back. It was then read to him by William Collings, and he said he understood it. No objection was made to the instrument for not being executed. Pittenger said he believed he should not take it. The whole difficulty appears to have been about the dower. The complainant was then ready to perform her part of the contract, and offered to do it; but the purchaser declined. This was sufficient. When money is to be paid, and the party who is to receive it refuses to take it, a formal tender is unnecessary. So, where a deed is to be given, and the party is present prepared to give it, and the one who is to receive it positively declines, there is no need of a formal execution and tender.

The complainant, then, is entitled to a decree, according to the prayer of her bill, unless another objection, not set up or adverted to in the answer, but strongly pressed in the brief submitted, shall prevail; which is, that the orders of the orphans' courts, under which the sale was made, are illegal and void.

As to the order of the orphans' court of Hunterdon, it is objected that it is illegal, inasmuch as it neither directs the whole of the land to be sold, nor does it direct any particular part or parts to be sold, but submits it to the discretion of the administratrix to sell the whole if necessary, or so much as will be sufficient. This is certainly irregular. The statute directs that when the orphans' court shall upon examination, find that a sale of all

the property is necessary, they shall direct the whole to be sold; and that, when a part or parts will be sufficient, they shall so decree, and specify in the order what particular parts shall be exposed to sale. This decree is entirely discretionary, leaving it to the administratrix to sell either the whole or a part. Such a decree would doubtless be reversed as erroneous and unlawful; but it does not follow, that this court is to regard it as a nullity. The orphans' court had general and complete jurisdiction of the subject matter, and were acting within an acknowledged and long established province. There is a decree *in fact*, and that is sufficient for the complainant's title.

This question is not a new one in this court. In the case of *Wilmurt* v. *Morgan*, already adverted to, it came up for consideration before chancellor Williamson. In that case, as in this, the complainants were administrators seeking to carry into effect a sale made by them in their representative capacity, and the same objection to the order of sale was then made. The chancellor held the order to be irregular and liable to be reversed, but that it was not null and void, as contended for by the counsel of the defendant.

I shall be pardoned for introducing here, such part of the able opinion delivered in that case, as refers to and decides this point. "But the important point," says the chancellor, "now necessary to be decided, is, whether the proceedings of the orphans' court are absolutely void, and their order for a sale a mere nullity; and not whether the proceedings are erroneous and irregular, and might have been set aside by the supreme court; for the order of the court remains unreversed, and must be regarded by this court, unless it can be considered and treated as an absolute nullity.

"Where an inferior court of special and limited powers, assumes a jurisdiction which it has not, their proceedings are absolutely void and a mere nullity, and of no legal effect, because the whole proceeding is *ceram non judice*. (2 *Wils.* 382.) But the court which made this order is a court of record, and of general jurisdiction over the subject that was before them, and does

not, in my opinion, come within that class of inferior courts of special and limited jurisdiction, whose proceedings can be disregarded and treated as mere nullities for error in judgment, or irregularity in their proceedings. In all the cases in which the proceedings of a court have been held to be a mere nullity, there has been *a want of jurisdiction*, either as to place, persons, or subject matter, upon which they decided; and where there is a want of jurisdiction in either of these respects, all is void. Where there is no jurisdiction at all, as in the case of the *Marshalsea*, (10 *Coke*, 76,) there is no judge, and the proceeding is as nothing: 2 *Wils.* 384. But when the court has a general jurisdiction over the cause, though their proceedings are directed by statute, and are not according to the common law, its judgments, if erroneous, are not void; and that was the principle of the decision in *Kemper's lessee* v. *Kennedy et al.*, 5 *Cranch*, 173.

"In the present case, the court undoubtedly had a general jurisdiction of the matter before them; and there is no want of jurisdiction as to persons or place. The order of the court may, therefore, be erroneous or irregular, but it is the order of a competent court, made in a matter of which they had jurisdiction; and until reversed or set aside, cannot be disregarded, or treated as a nullity, when incidentally brought into question in another court. And the contrary doctrine would be extremely dangerous and alarming; and I am very apprehensive, would shake a great proportion of the titles held under proceedings in the orphans' courts, which there is too much reason to believe, are drawn up with great looseness and irregularity; and there would be no safety in purchasing at sales under the orders and decrees of these courts, if the title of the purchaser could be impeached for error or irregularity in their proceedings.

"In my opinion, therefore, the order for sale, until reversed or set aside, cannot be disregarded or treated as a nullity, but must be considered as valid and effectual."

It will be seen from this opinion, and the authorities to which it refers, that the principle on which the court acts is perfectly settled, and that the objection to this order is groundless.

As to the order of the orphans' court of Somerset, it is correct in point of form. And the difficulty stated by the defendant's counsel, that the order is made by the orphans' court of a county other than the one in which the letters of administration were granted, is obviated by the plain provision of the act: *Rev. Laws*, 435, s. 19. The application for sale of real estate is to be made, not to the orphans' court in the county where letters of administration were granted, but where the lands lie of which the intestate died seized. There can, therefore, be no doubt of the power of the orphans' court of Somerset to make the order.

Upon the whole case, the complainant is entitled to a decree for a specific performance, according to the prayer of her bill.

JAMES KINNEY v. JOSEPH OGDEN, Administrator of GABRIEL OGDEN, deceased.

An injunction issued to restrain proceeding in attachment against a non-resident debtor, for the recovery of a judgment debt, at the instance of the defendant in attachment, will be dissolved, unless the amount of the judgment be deposited with the clerk of this court before issuing the injunction.

The statute declaring that an injunction shall not issue to stay proceedings at law in any personal action after judgment, unless the amount of the judgment, with costs, be first deposited with the clerk of the court by the applicant for the injunction, if he be a defendant in the said proceedings at law, is not limited to proceedings in the same suit.

The meaning of the statute is, that a party who has obtained a judgment shall not be stayed or hindered in any suit or proceeding he may institute for the recovery of it, unless the amount of the judgment be first deposited with the clerk of the court.

Chancery will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defence, or unless he was prevented from availing himself of the defence by fraud or accident, or the act of the opposite party, unmixed with negligence or fraud on his part.

INJUNCTION bill, to restrain proceedings at law, filed June seventh, 1833. The object of the bill was to restrain proceedings

upon an attachment issued out of the inferior court of common pleas of the county of Bergen, against the complainant and Elias Kinney, as non-resident debtors, for the amount of a judgment previously rendered against them, in favor of the defendant in this cause. Upon filing the bill an injunction was allowed by chancellor Seeley. An answer having been filed by the defendant, the cause was heard upon motion to dissolve the injunction.

S. Scudder and *E. Vanarsdale*, for defendant.

I. H. Williamson, contra.

Cases cited in support of the motion. *Rev. Laws*, 705, s. 6; 2 *John. Chan. R.* 228; 1 *Ibid*, 49, 91, 320, 465; 6 *Ibid*, 87.

The Chancellor. The defendant seeks to have the injunction in this case dissolved on two grounds, both of which, I think, are well taken.

The *first* is, that the injunction issued to stay proceedings at law, after judgment, without any deposite being first made of the amount of the judgment and costs.

The defendant, in 1820, had recovered a judgment against the complainant, in the court of common pleas of the county of Sussex. The complainant afterwards removing to the county of Bergen, and the judgment, or the greater part of it, remaining unpaid, a suit was brought upon it in that county, and a second judgment recovered in January, 1823. The complainant then removed to the city of New-York, and having afterwards acquired property in this state, a writ of attachment was sued out by the defendant to seize the property, and thereby out of it to make the money still due on the last mentioned judgment. The injunction was issued to stay the proceedings in the attachment.

It was necessary, before the injunction could rightfully issue under these circumstances, that the amount due on the judgment should have been deposited with the clerk. By the sixth section

of the practice act, (*Rev. Laws*, 704,) it is enacted, that an injunction shall not issue, to stay proceedings at law, in any personal action, after a verdict or a judgment, unless a sum of money, equal to the amount for which the verdict or judgment is given, with costs, shall be first deposited with the clerk of the court, by the applicant for such injuntion, if such applicant shall be a defendant in the said proceedings at law.

This provision is not limited to proceedings in the same suit. It does not mean, simply, that a party shall not be restrained from issuing execution on a judgment, or from proceeding to make the money on such execution. But it means, that a party who has obtained a judgment, shall not be stayed or hindered in any suit or proceeding he may institute for the recovery of it, unless the amount of it be first deposited in the office. Such is the true spirit of the section, and the reason of the thing.

If a party shall not be injoined against issuing execution, he ought not to be injoined against proceeding by attachment, when that would be more effectual than an execution. Both are proceedings at law after judgment, and the object of both is the same, viz. the recovery of the amount of the judgment.

In the case of *Newton* v. *Douglass*, there was a bill in equity filed, to enforce the collection of money due on a judgment, after the return of an execution at law unsatisfied, and the defendant in equity sought to restrain the proceedings in that court. The chancellor said, if the complainant had any equity in his case, he could not have been entitled to an order in the nature of an injunction, without paying into court a sum of money equal to the amount of the judgment and costs, in conformity with the statute. And he held that, although the statute (which is, *quoad hoc*, the same as ours) did not in terms embrace a proceeding in chancery to enforce the collection of a judgment, yet it was within the spirit of the law: 1 *Hoff. Prac.* 89, *in notis*.

On this first ground, I am of opinion, that the order for an injunction was improvidently made, and that the injunction itself should be set aside for irregularity.

The defendant is entitled, also, to have the injunction dissolved

on the merits. There is no equity in the bill to sustain it; and the bill is not helped by the answer. The gravamen of the complaint is, that the second judgment is for more than the sum actually due; that he ought to have had credit for the amount of certain receipts, which he placed in the hands of an attorney, who lost or mislaid them. But it appears upon the complainant's own showing, that although he must have known, or ought to have known, of the loss of these receipts, before the entry of the judgment, yet he made no effort to supply their loss; he filed no plea, nor did he make any defence whatever to the action. If a discovery was necessary to the ascertainment of his rights, he ought then to have sought it. He thought proper to omit it, and suffer judgment to be entered against him. It is too late to come to this court now for relief. It can afford no aid to those who thus neglect their rights. No obstacles were interposed by the defendant, and the complainant has not assigned a single reason why the court should depart from its settled practice.

The general principle governing all cases of this kind, has been long established, and is well defined by the court in the case of *Foster* v. *Wood*, 6 *John. Chan. R.* 87. "Chancery will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defence, or unless he was prevented from availing himself of the defence by fraud or accident, or the act of the opposite party, unmixed with negligence or fraud on his part."

The complainant insists, however, that he is entitled to a credit of about forty dollars for an account against the defendant since the rendition of the second judgment, and that he refuses to give him credit for it. The defendant admits the account as an equitable claim, and believes he has given credit, or made an allowance for it, in calculating the amount of debt inserted in the affidavit on which the attachment issued. Whether this was so done or not, appears to me immaterial. The defendant admits the justness of the account. It is, then, a fair matter of

offset against the amount due on the judgment; and the auditors who are to adjust the claims of the plaintiff in attachment, as well as the other creditors, will make the proper allowance for it. There is no equity springing out of the fact, (if it be true,) that the plaintiff in the attachment had neglected or omitted to allow it in the affidavit. That is not conclusive upon the rights of the complainant.

Let the injunction be dissolved.

JOHN VAN WINKLE v. ADRIAN VAN HOUTEN et al.

In order to charge legacies on the land and to exempt the personal estate, there must be an expression of intention so clear as to admit of no reasonable doubt.

Land may be charged with the payment of legacies either by express words, or by implication; and if by implication, it must be a fair and satisfactory inference that such was the intention of the testator.

In ascertaining the intention of the testator, when he has not charged his lands expressly with the payment of debts or legacies, we must be governed not only by the expressions of the will, but by the situation of the property disposed of, and of the person taking it.

A general residuary clause, embracing real and personal estate, where nothing but pecuniary legacies are previously given, and where of course nothing else could be taken out of the real estate so as to constitute a residue, is not to be taken as full evidence that the legacies are to be charged on the land. But it is some evidence. It is a circumstance which, taken in connexion with others, may satisfy the mind of the testator's intention.

Residuary clauses are usually introduced to prevent an intestacy as to any part of the estate, and are construed accordingly. They generally follow specific devises, and conclude the will. But when the whole of a large estate, excepting two or three pecuniary legacies, is embraced in the residuary clause, and no where else, it is fair to infer that something more was meant than a bare prevention of intestacy.

Such instances are not frequent, and when they occur may justly be considered as affording some evidence of the mind of the testator. It may be small but it should have its weight.

The fact that the legacy is a provision for a child, one of the heirs, and not

legacy purely voluntary, as to a stranger or one having no claims of nature or kindred, is a circumstance going to show an intention to charge the legacy on the land.

So the fact, that the residuary legatees and the executors are the same persons, though not full evidence of an intention to charge the land, is a circumstance entitled to consideration in ascertaining the testator's intention.

The fact that a part of the legacy is in consideration of lands of the legatee appropriated by the testator to his own use, is of great importance in ascertaining the intention of the testator, and a strong circumstance in favor of charging the land.

Will any of the foregoing circumstances, standing alone, ascertain the intention of the testator to charge the land, with sufficient certainty to found a decree?—*Quere.*

Where it appeared that there was a deficiency of personal assets; that the residuary clause, though not peculiar in itself, was peculiar in reference to the dispositions of the will; that the clause was better satisfied by charging the legacies on the real estate than by a different construction; that it was a provision for infant heirs, and not a mere voluntary legacy; and that the property of the legatees had been taken by the testator and mingled with his own estate to constitute a common fund for the benefit of the devisees, out of which a certain sum was to be paid to the legatees; *held*, that the intention of the testator was, that the legacies should be paid at all events, and that they were a charge upon the land.

Upon a bill for a legacy, if the lands charged with the payment of the legacy have been partitioned and are held in severalty, and the bill seeks to charge the balance due on the legacy upon one moiety of the land, which in equity is bound to satisfy it, it is unnecessary to make the owners of the other moiety of the land parties to the bill.

BILL filed tenth of July, 1832. The bill states, that the complainant attained the age of twenty-one years on the twentieth day of May, 1828; that his father, John Van Winkle, died many years previous thereto, in the life-time of the complainant's paternal grandfather, Cornelius Van Winkle. That the said Cornelius Van Winkle, at the time of making his will, and at the time of his death, was seized and possessed of a valuable real and personal estate in the counties of Essex and Bergen, in this state. That the complainant's paternal grandmother, the wife of the said Cornelius Van Winkle, was also seized in her life-time, and at the time of her death, of a large and valuable

real estate in the county of Bergen. That upon her death, which happened in the life-time of her husband, the said Cornelius Van Winkle, the same descended to her heirs at law in such shares and portions as the law of descents then in force in this state prescribed, subject to the life estate of the said Cornelius Van Winkle, as tenant by the curtesy. That the said Cornelius Van Winkle and his wife, the grandfather and grandmother of the complainant, had four children, viz.: John, the father of the complainant, who died in the life-time of his father, leaving the complainant his only child and heir at law; Walling, who also died in the life-time of his father, leaving a son, Cornelius, his only child and heir at law, who is still living; Tiney, the wife of Adrian Van Houten, and Jane, the wife of Stephen Baker, both of whom, with their husbands, still survive.

That on the first day of January, A. D. 1814, the said Cornelius Van Winkle, the grandfather of the complainant, made and published his last will and testament, in due form of law to pass real estate, in the words following, to wit:—

"In the name of God, Amen. I, Cornelius Van Winkle, of the town of Paterson, in the county of Essex, and state of New-Jersey, finding myself advancing in the decline of years, and being in bodily health and of sound and disposing mind and memory, do make and publish this as for my last will and testament. That is to say: First, I do will and direct that all my just debts and the expenses of my funeral, be paid by my executors as soon as conveniently may be after my decease.

"Item: I do give and bequeath to my grandson, Cornelius Van Winkle, the son of my son Walling Van Winkle, deceased, the sum of one hundred and fifty dollars, to be paid to him at the expiration of each and every year after my decease, until he arrives at the full age of twenty-one years, by my executors. I do also give and bequeath to my said grandson Cornelius, if he lives to be twenty-one years of age, the sum of five thousand dollars, to be paid to him by my executors as follows: that is to say, the one half thereof in six months after he arrives to the age of twenty-

one years, and the other half thereof in one year after he arrives to the age of twenty-one years.

"Item: I give and bequeath to my grandson, John Van Winkle, the son of my son John Van Winkle, deceased, the sum of one hundred and fifty dollars annually, until he arrives at the full age of twenty-one years. The first sum to become due at the expiration of one year after my decease, and after he arrives at the age of fourteen years, which sum is to be annually applied by my executors after it becomes due, towards the education, maintenance and support of my said grandson John, until he arrives at full age, when the same is to cease. On the death of either of the above named grandchildren before he arrives at the age of twenty-one years, the annuity above given to him is to cease. Item: I do give to my said grandson, John Van Winkle, the son of my said son, John Van Winkle, deceased, if he lives to be twenty-one years of age, the sum of five thousand dollars, to be paid to him by my executors, the one half thereof in six months, and the other half thereof in twelve months, after he arrives to the full age of twenty-one years.

"Item: I do give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, wheresoever and whatsoever nature and description the same may be, to my two daughters, Tiney, the wife of Adrian Van Houten, and Jane, the wife of Stephen Baker; to be equally divided between my said two daughters, share and share alike; to have and to hold the same to them, their heirs and assigns, for ever.

"And whereas my wife, Anna Van Winkle, died seized of, or entitled to, a considerable real estate situate in the township of Saddle River, in the county of Bergen, which she desired should be equally divided between my two daughters above named, now my will is, that if either of my above named grandsons shall refuse to release to my said daughters, and to their heirs and assigns for ever, all his right, title and interest, of, in and to the said real estate, that is, the one moiety thereof to my daughter Tiney or her heirs, and the other moiety thereof to my daughter Jane or her heirs, if requested so to do by my executors or either of

them, or by my daughters or their heirs or either of them, within six months after my said grandsons shall respectively arrive at the full age of twenty-one years; then I will that the sum of fifteen hundred dollars shall be deducted from the legacy given to such grandson as shall refuse so to release, to be taken from the first payment directed to be paid to him after he comes of age; which sum I desire shall go to my daughters, with the residuary part of my estate.

"Item: I will that in case either of my said grandsons shall die without leaving a child lawfully begotten living at the time of his death, that then and in such case the portion which I have directed to be paid to such grandson, or such part as remains unpaid, shall be equally divided between my two daughters and my surviving grandson; but if he leaves a child or children lawfully begotten, then such child or children to take it on the same condition the father did.

"And lastly, I do hereby nominate, constitute and appoint, my two sons in law, to wit, Adrian Van Houten and Stephen Baker, executors of this my last will and testament; hereby revoking all former wills by me made, and ratifying and confirming this to be my last will and testament.

"In testimony whereof, I have hereunto set my hand and seal, this first day of January, in the year of our Lord one thousand eight hundred and fourteen."

The bill further states, that after the death of the said testator, the said Adrian Van Houten and Stephen Baker, the executors therein named, proved the said will, and took upon themselves the burthen of the execution thereof; and that they, or one of them, paid and applied to the complainant's benefit, the sum of one hundred and fifty dollars annually during his minority, as directed by the said will. That some time after the complainant came of age, the said Stephen Baker paid to the complainant the sum of two thousand five hundred dollars, being the one half of the said legacy of five thousand dollars, so as aforesaid bequeathed to him; whereupon the complainant released all his right, title and interest in and to the lands and

real estate of his said grandmother, to her daughters, the said Tiney Van Houten and Jane Baker, as directed by said will; or else the complainant released to the said Jane Baker one moiety of all his right, title and interest of, in and to the said lands; or executed some writing agreeing to execute such release upon receiving the whole amount of the said legacy of five thousand dollars; and if the instrument thus executed and delivered to the said Stephen Baker, did not amount to a full and sufficient release of all his right, title and interest in and to the said lands of the complainant's grandmother, he always has been, and still is, willing and ready to execute a full and sufficient release, pursuant to the directions of the will of the said testator. That the said Adrian Van Houten paid to the complainant, in the month of December, 1828, the sum of three hundred dollars, and in the month of May, 1829, the further sum of seven hundred dollars, on account of the balance due upon the said legacy of five thousand dollars. That the complainant has never received any payments on account of the said legacy, except as herein before mentioned; and that there still remains due to him, on account of the said legacy, the sum of fifteen hundred dollars of principal, with a large amount of interest thereon.

That the said executors have paid and satisfied to the said Cornelius Van Winkle, the other legatee named in the said will, his legacy in full; and that the said Stephen Baker and Adrian Van Houten have become insolvent, and have severally taken the benefit of the insolvent laws of this state. That a large amount of the personal property of the said testator, and much more than sufficient to pay all his debts, came to their hands, as his executors, and as legatees or devisees in remainder, in right of their wives, respectively; but that the personal estate and property of the said testator, was not sufficient to pay all his debts and all the legacies given by his will; and that the complainant has no means of recovering from the said executors, or from either of them, the balance due on the said legacy; but the complainant is advised and charges, that the said legacy is a charge upon the lands and real estate of the said testator, so as aforesaid

devised by him to his daughters, the said Tiney Van Houten and Jane Baker. That the said lands and real estate are of great value, and much more than sufficient to pay the whole of the said legacies, besides the lands and real estate of the complainant's grandmother, which the testator by his will directed to be released by the complainant and the said Cornelius Van Winkle, in manner aforesaid.

The bill further states, that the said Stephen Baker and Adrian Van Houten, with their respective wives, made partition between them by mutual releases or otherwise, as well of the lands and real estate of the said testator, as of the lands and real estate of the complainant's grandmother; and that since the said partition, the said Stephen Baker and his wife have, at different times and to sundry persons, alienated or incumbered the whole of his wife's share of the said lands; but when, in what parcels, to whom, and for what considerations, is unknown to the complainant, and the said Stephen Baker refuses to discover and make the same known to the complainant. That the said Adrian Van Houten has also, at different times and to sundry persons, sold and conveyed parts and parcels of the said real estate that fell to the share of his wife, or has charged or incumbered the same by mortgages, judgments or otherwise, but to whom, when, and upon what consideration, is unknown to the complainant; except that he has heard, and believes it to be true, that on or about the eleventh day of January, 1826, the said Adrian Van Houten and Tiney his wife, executed a mortgage upon a part of the real estate of the said testator, situate at Paterson, to one John J. Ackerman, since deceased, to secure the payment of two thousand five hundred dollars; and that on or about the first day of February, 1826, the said Adrian Van Houten and wife executed another mortgage upon the same land, to one Garrabrant Van Houten, now also deceased, to secure the payment of the further sum of two thousand five hundred dollars; and also, that on or about the seventeenth day of March, 1826, the said Adrian Van Houten alone, without his wife, for the pretended consideration of ten thousand five hundred dollars,

sold and conveyed the lands covered by the aforesaid mortgages, together with other lands formerly belonging to the said testator, to the said John J. Ackerman, to have and to hold to him during the life of the said Adrian Van Houten. That the said John J. Ackerman has since died intestate, leaving Elsie Ackerman his widow, and John J. Ackerman, Peter J. Ackerman, Tiney wife of Tunis Cole, and Rachel wife of Abraham Lozier, his children and heirs at law. That the said Elsie Ackerman has administered upon his estate; and that the said Peter J. Ackerman has taken an assignment from the administrators of the said Garrabrant Van Houten, deceased, of the mortgage so as aforesaid given by the said Adrian Van Houten and wife to the said Garrabrant Van Houten; so that, as well the said mortgages as the life estate of the said Adrian Van Houten in the lands conveyed by him as aforesaid to the said John J. Ackerman, are now held and claimed by the family of the said John J. Ackerman, deceased.

The bill prays, that an account may be taken of the amount still due to the complainant upon his said legacy, and that the defendants may be decreed to pay the same, with costs, or otherwise that so much of the lands and real estate of the said testator, as was devised by him to his said daughters, as will be sufficient for the purpose, may be sold under the direction and decree of the court, to raise and satisfy what may be found due to the complainant upon the said legacy; and that the complainant may have such other relief in the premises as the nature and circumstances of the case may require, &c.

To this bill separate answers were filed by Adrian Van Houten and Tiney his wife, and by Peter J. Ackerman.

Adrian Van Houten and wife, by their answer, admit most of the material facts in the bill; and state that two thousand five hundred dollars, the one half of said legacy, was paid to the complainant by Stephen Baker, at which time the complainant fully and absolutely released the said Stephen Baker from all further claims and demands against him on account of the said will. But they deny that the complainant ever released his right, title

and interest, of, in and to the lands and real estate which were of the wife of the said Cornelius Van Winkle, to Tiney Van Houten and Jane Baker; and although he may have executed such release to the said Jane Baker, for the share to which she was entitled in severalty, yet these defendants have repeatedly applied to him for a release to the said Tiney Van Houten, in pursuance of the said will, which he wholly declined and refused to make; whereupon notice was given to the complainant, that the sum of fifteen hundred dollars, being the residue of the said legacy remaining unpaid, would be retained for the benefit of the said Tiney Van Houten, pursuant to the provisions of the said will. They further insist, that the execution of the said release by the complainant, was a condition precedent to the payment of the said legacy, and that having absolutely refused to execute such release to the said Tiney Van Houten, she is entitled by virtue of the said will to deduct the said sum of fifteen hundred dollars from the legacy of the complainant, and that the complainant is barred from recovering the same. They further insist, that the personal property of the testator was sufficient to pay the debts and legacies, and that the legacy of the complainant ought to be paid out of the personal estate of the testator, and is no charge upon his real estate.

Peter J. Ackerman, by his answer, insists that the mortgages upon the said land, and the sale thereof by Adrian Van Houten to John J. Ackerman, as stated in the complainant's bill of complaint, were made bona fide, for a full and valuable consideration; that the said land is not held in trust for the said Adrian Van Houten; that he is the bona fide holder, in his own right, of the said mortgages, having received the same by assignment, and also of all the right, title and interest of the said Adrian Van Houten in the land conveyed by him as aforesaid; and this defendant insists that he holds the same free and clear from any claim to be made by the complainant, and that in equity the said land is not chargeable with the payment of the said legacy, or any part thereof.

Replications to the several answers were filed, and the cause

came on for hearing upon the bill, answers, replications and proofs, at a special term held at Paterson, on the eighteenth day of June, 1834.

A. S. Pennington and *Vanarsdale*, for complainant.

E. B. D. Ogden and *I. H. Williamson*, for defendants.

Cases cited by complainant's counsel. 1 *Vesey*, 436; 3 *Vesey*, 737, 551; 1 *Atkyns*, 382; 2 *Atkyns*, 268, 273; 2 *Ventris*, 228, 143; 2 *Dallas*, 131; 2 *Binney*, 525; 3 *Cond. Chan. R.* 714; 4 *Russ.* 376; 4 *Mad.* 187; 2 *Eq. Cas. Ab.* 497; *Jeremy's Eq.* 102–3; 2 *John. Chan. R.* 92; 3 *Vesey*, 692; 12 *Vesey*, 476; 1 *Munford*, 373.

Cases cited by defendants' counsel. 2 *John. Chan. R.* 614; 1 *Cond. Chan. R.* 604; *Sim. and Stu.* 592; *Toller*, 415; 1 *Merivale*, 216; 2 *Vesey*, 328; 5 *Vesey*, 359; 7 *Vesey*, 209; 3 *Merivale*, 310.

THE CHANCELLOR. Cornelius Van Winkle, late of Paterson, died some years ago, leaving two daughters, Tiney the wife of Adrian Van Houten, and Jane the wife of Stephen Baker; and two grandsons, viz. Cornelius the son of Walling Van Winkle, deceased, and John (the present complainant) the son of John Van Winkle, deceased. By his last will and testament, duly executed to pass real estate, after ordering his debts and funeral expenses to be paid by his executors, he gave to each of his grandsons an annuity of one hundred and fifty dollars, until they shall attain the age of twenty-one years. He then gave to each of them five thousand dollars, the one half payable in six months, and the residue in one year, after they severally attain the age of twenty-one years. All the rest and residue of his personal and real estate, of what nature soever, he gave to his two daughters, Tiney and Jane. And as his wife, Ann Van Winkle, had died seized of a considerable real estate in Saddle

River, in the county of Bergen, which she desired should be equally divided between the two daughters, the testator directed that if either of his two grandsons should refuse to release to the said daughters, and their heirs and assigns, all his right and interest in the said real estate, if requested so to do by the executors, or the daughters or their heirs, within six months after the said grandsons should respectively attain the age of twenty-one years, then the sum of fifteen hundred dollars should be deducted from the legacy of the one so refusing, to be taken from the first payment to be made to him after he arrived at age; which sum, thus deducted, should go to the daughters with the residuum.

The bill is filed to recover the sum of about fifteen hundred dollars, being the balance due complainant on his legacy of five thousand dollars. It states, that after the complainant came of age, Stephen Baker paid him two thousand five hundred dollars, being half the legacy, and thereupon he, the complainant, released all his interest in the lands or real estate, late of his grandmother, to the said Tiney and Jane; or else he released to the said Jane Baker a moiety of his right and interest in the said lands; or he executed some instrument signifying his willingness to give a release on his receiving the amount of the said legacy; and that if the instrument does not amount to a sufficient release, he is ready and willing to execute one, according to the true intent of the will.

The bill further states, that about six months after complainant came of age, he received of Adrian Van Houten the sum of three hundred dollars, on account of the balance then due; and some time in May, 1829, the further sum of seven hundred dollars; since which he has received nothing either from Baker or Van Houten. That they have both become insolvent, or are reputed to be so, and the personal estate of the testator was insufficient to pay all his debts and legacies.

That the complainant is advised that the said legacy is a charge upon the lands and real estate of the said testator so devised as aforesaid to his daughters, which lands are of great val-

te, and more than sufficient to pay the whole of the said legacies, besides the lands and real estate of the grandmother.

That Baker and Van Houten and their wives, made partition of all the real estate; and that Baker and wife have, at different times, and to different persons, aliened or incumbered the whole of his wife's share, but when, and to whom, he refuses to discover.

That Van Houten has also, at different times, incumbered his wife's estate, or sold different parts of it. That about the eleventh of January, 1826, he and his wife gave a mortgage on part of it to John J. Ackerman, since deceased, to secure the sum of two thousand five hundred dollars; and on the first of February, 1826, they gave another mortgage on the same lands to one Garrabrant Van Houten, now also deceased, to secure the further sum of two thousand five hundred dollars. That about the seventeenth of March, 1826, Van Houten alone, without his wife, conveyed the said mortgaged lands, together with other lands formerly belonging to the testator, to the said John J. Ackerman, to hold during the life of the said Adrian Van Houten, for the pretended consideration of ten thousand five hundred dollars. That the said John J. Ackerman has since died, intestate, leaving Elsie Ackerman his widow, (who has administered upon his estate,) and John J. Ackerman, Peter J. Ackerman, Tiney wife of Tunis Cole, and Rachel wife of Abraham Lozier, his children and heirs at law. That Peter J. Ackerman has taken an assignment from the administrators of Garrabrant Van Houten, deceased, of the mortgage given to him, so that as well both the said mortgages, as the life estate of said Van Houten, in the lands conveyed by him to the said John J. Ackerman, are now held and claimed by the family of the said John J. Ackerman, deceased.

The complainant then charges, that the executors are jointly as well as severally liable, and that for want of personal assets, or in case they have been misapplied by the executors, his legacy is a charge upon the land, and he is entitled to have the same raised and paid to him out of the same. That the conveyances

have been made in fraud of the claim of the complainant, and with notice of such claim. That the sale to Ackerman was collusive and fraudulent as against the complainant, the consideration never having been paid; and that the family of Ackerman now hold the property in trust for the use of Van Houten and his wife. He prays an account, and that the defendants may be decreed to pay the sum due; or that so much of the real estate devised by the testator to his said daughters, as may be sufficient, may be sold to raise the same, and for general relief.

Van Houten and wife, in their answer, admit that Baker paid to the complainant two thousand five hundred dollars, being half the legacy; and they allege that the complainant fully released him, the said Baker, from any claims against him under the will; but they deny that he ever released his interest in the lands which were of the wife of the testator, to Tiney Van Houten and Jane Baker. That when the three hundred dollars were paid to him, and also when the seven hundred dollars were paid, they required a release, and that he refused to release until he had received the balance of the legacy, and they thereupon gave notice that they would retain the fifteen hundred dollars for the benefit of Tiney Van Houten. They insist that the tender of the release was a condition precedent, and this not having been done, the complainant is precluded.

They allege that the personal estate was sufficient to pay the debts and legacies, and admit that Van Houten and Baker are insolvent, but deny that the legacies are chargeable on the land. They admit the partition of the lands, and that Baker and wife have aliened their share. Van Houten admits the sale of all his interest in the lands to John J. Ackerman, but denies that there was any fraud or trust, and insists that the whole of the consideration, over and above the incumbrances, was fully paid to him or to his use and benefit.

Peter J. Ackerman has also answered. He insists that the sale and mortgages were bona fide, and that the land was not held in trust by his father; that he is now the bona fide owner of the said mortgages, having received them by assignment from

the estate of his father. It submits that the lands are not chargeable with the legacies, or any part of them.

There are two points to be considered:—First, Whether the complainant is in a situation to make the demand set up in his bill. Secondly, Whether such demand is well founded; or, in other words, whether the legacy claimed is a charge on the land.

As to the *first*, it presents to my mind no difficulty in the way of the complainant's recovery. He was to receive five thousand dollars, unless he refused to give a certain release within six months after he arrived at age, if requested to do so by the executors or either of them, or by the testator's daughters or either of them. It is alleged that such request was made within the time specified, but the allegation is unsustained by proof. It was not a condition precedent, to be performed on the part of the complainant. The structure of that part of the will, and the reason of the thing, are against it. But the conduct of the executors in relation to the payment of part of the legacy, puts the matter beyond dispute, and shows that the difficulty now raised about the release is an afterthought. About six months after the complainant became of age, Van Houten paid him three hundred dollars on account of the legacy, and nothing was said about a release; no demand was made, no notice was given that the executors and devisees considered the tendering of a release a condition precedent, and that they would not pay unless it was given. So, too, at the expiration of a year from the time the complainant came of age, Van Houten paid him the further sum of seven hundred dollars—making one thousand dollars in the whole; and yet there was no release called for. It is evident from these facts, that no difficulty was made about it at that time. It is too late now to set it up as a bar to the claim.

The *second* point presents a question of some interest and importance.

Real estate is not, ordinarily, the fund out of which legacies are to be paid. They are, as a general rule, to be satisfied out of the personal property. They may, nevertheless, be charged on the land, at the will of the testator. He may charge them

on the land, and exempt the personal estate. This is not often done, and to effect it there is required an expression of intention so clear as to admit of no reasonable doubt. Or, the testator may make his real estate liable for legacies, in case his personal property is insufficient to pay them. And this is what is generally meant by the expression, charging the land with the payment of legacies. Of this character is the charge set up by the complainant.

It may be either by express words, or by implication; and if by implication, it must be by a fair and satisfactory inference that such was the intention of the testator. This is the rule laid down by the court in *Lupton* v. *Lupton*, 2 *John. Chan. R.* 614. It was held in a late case by the vice-chancellor, (2 *Sim. and Stu.* 592; 1 *Cond. Chan. R.* 604, *Parker* v. *Fearnley*,) that in searching for the intention of the testator, we are to be confined to the will itself, without reference to the situation of the property disposed of by the will; and that the court cannot even take into consideration the amount of the personal estate, but must be governed solely by the expressions of the testator. This principle is too limited to be practically useful. Many cases have been decided on the ground that the property or fund originally chargeable has failed: *Webb* v. *Webb*, *Barnard. Rep.* 86; 2 *Eq. Cas. Ab.* 504. And when the residue of the lands out of which legacies were properly payable had failed, and there was no such residue, the court held as charged other lands, that had been specifically devised in strict settlement with remainder over. In *Lypet* v. *Carter*, 1 *Vesey*, *sen.* 499, the court charged the land, on the ground that without it the daughter to whom one hundred pounds had been given, would be without a provision.

In ascertaining the intention of the testator, when he has not charged his lands explicitly with the payment of debts or legacies, we must be governed not only by the expressions of the will, but the situation of the property disposed of, and the person taking it. This I understand to be the meaning of the rule adopted by the court in New-York. With this rule as our

guide, let us see whether the complainant's claim can be sustained.

And first, as to the language itself. The structure of the will is simply this. It gives to the two grandchildren who represent the deceased sons of the testator, an annuity of one hundred and fifty dollars each, until they attain twenty-one years. It then gives to each of them five thousand dollars; and the rest, residue and remainder of the testator's estate, both real and personal, wheresover and of whatsoever nature and description the same may be, is given to the testator's two daughters, their heirs and assigns for ever.

It is argued on the part of the complainant, that the terms "rest, residue and remainder," apply as well to the real as the personal estate; and hence, that it is fairly to be inferred, the testator intended to charge the realty, and supposed that part of it might be necessary to satisfy the legacies; that it is not a specific devise of real estate, but a general devise of so much as may remain after some other or prior claim is satisfied out of it, and there can be no such claim but the legacies. On the contrary, it is contended for the defendants, that the general residuary clause affords no evidence of any such intention on the part of the testator.

It is said by the court in the case of *Lupton* v. *Lupton*, 2 *John. Chan. R.* 614, that the construction of the residuary clause is "perfectly well settled;" that it affords no evidence of an intention to charge lands with a pecuniary legacy. Such was the rule as laid down, but the case before the court did not call for one so broad. There had been a specific devise of land, by the testator, though the fact is not noticed in the opinion. A part of the real estate had been disposed of, so that the words "residue and remainder of my real estate," had their appropriate and strict meaning.

In order to show that the construction of the residuary clause is perfectly well settled, the case of *Keeling* v. *Brown*, 5 *Vesey*, 359, is cited; but the principle of that decision is not in point. In that case there were personal assets sufficient to pay all the

debts, as well simple contracts as specialty debts, and there was no pretence that they were charged on the real, to the exclusion of the personal property. The bill was filed by legatees, to compel the marshalling of the assets and throw the specialty debts on the land, that the legacies might be paid out of the personalty. It did not claim that the legacies were charged on the real estate. It was very clear, that the debts were not so charged while there was personal property to pay them, and that there was a sufficiency of personal property was not denied. The court was asked to marshal the assets in favor of legatees. According to the opinion held by the master of the rolls, who decided this case, there is a wide difference between debts and legacies. They do not stand on the same foot, as regards charging land. The debts are preferred, and consequently were to be first paid. The claims of the creditors were of different grades, and whether the land was or was not a subsidiary fund for the payment of debts, was immaterial, for in neither case were the legatees entitled to have the assets marshalled. If there had not been personal assets enough to pay the debts, the court would have marshalled the assets in favor of the simple contract creditors, and thrown the specialty debts on the land. That was admitted by all. The point of the case, then, if I understand it, was, not whether the legacies were charged on the land, but whether the specialty debts should be thrown on the land in favor of the legatees, there being personal assets enough to pay all the debts, but not enough to pay the legacies. By such operation, the legacies might have been satisfied out of the personal estate.

In another point the case was dissimilar from the present. There were several specific devises of real estate, before the residuary devise, and consequently there was something for the residuary clause to operate upon, without inferring that the testator supposed a part of the real estate would be needed to pay the debts or legacies.

Until lately, the question has not been distinctly raised in the English chancery, whether a general residuary clause, embracing real and personal estate, will have any effect to charge real estate

with the payment of legacies, where nothing but pecuniary legacies were previously given, and where, of course, nothing else could be taken out of the real estate, so as to constitute a residue. The case of *Hassell* v. *Hassell*, *Dick.* 527, was like the present, so far as this question is concerned; and it was held that the legacies were charged on the real estate in aid of the personal; but as the executor and the residuary devisee were the same person, and some of the expressions used by the testator were rather peculiar, apparently indicating some intention to charge the land, and as the court gave no reasons for its judgment, it is impossible to ascertain the principle on which it was founded.

So in *Awbry* v. *Middleton*, 2 *Eq. Cas. Ab.* 497, there were pecuniary legacies, and then a general residuary clause, embracing real and personal estate; and the court held the land charged, but apparently on the ground that the devisee was also executor and heir at law.

Many other similar cases might be referred to, but in all of them, the point, when raised, was blended with other matters, and did not receive a distinct consideration.

In the late case of *Cole* v. *Turner*, 4 *Russ.* 376; 3 *Cond. Eq. Rep.* 714, it was more singly presented than in any adjudication I have met with. The testator gave his wife two hundred pounds, and an annuity of two hundred and fifty pounds during her life; also, fifty pounds a year for the education and maintenance of his children, and two thousand pounds for each child on his attaining the age of twenty-one years. He then gave, devised and bequeathed the rest, residue and remainder of his freehold, copyhold and leasehold estates, all his stock, utensils, farming implements, and the rest of his real and personal property, to his executors, in trust for his four children, and appointed two of his sons and two strangers executors. The question was, whether the annuities and the pecuniary legacies given prior to the devise to the trustees, were or were not a charge upon the freehold, copyhold and leasehold estates comprised in that devise. And it was argued expressly on the point, that the words of the residuary clause necessarily imply that something was to be

taken out of the freehold, leasehold and copyhold estates, and there was nothing that could be taken from the mass, but these legacies. The master of the rolls said, these estates are not devised to the trustees, but the rest and residue of them; that is, what remains after some prior purpose is satisfied; and that prior purpose can only be the satisfaction of the annuity and the legacies. They were accordingly held to be well charged on the real estates. This case is entitled to respectful consideration.

I am not, however, by this single decision, and some others that are partially analagous to it, led to the conclusion that the residuary clause is, under like circumstances, to be taken as full evidence that the legacies are to be charged on the land. This would be going too far. But it is some evidence. It is a circumstance which, taken in connection with others, may satisfy the mind of the testator's intention.

These residuary clauses are usually introduced to prevent an intestacy as to any part of the estate, and are construed accordingly. They generally follow specific devises, and conclude the will. But when the whole of a large estate, excepting two or three pecuniary legacies, is embraced in the residuary clause, and no where else, it is fair to infer that something more was meant than a bare prevention of intestacy. Such instances are not frequent; and when they occur, may justly be considered as affording some evidence of the mind of the testator. It may be small, but it should have its weight. In this case I think it justly entitled to consideration.

Secondly: Another matter appearing on the face of the will, is, that the legacy was a provision for a child, one of the heirs; differing therein from a legacy purely voluntary, as to a stranger, or one having no claims of nature or kindred.

In *Lypet* v. *Carter*, already cited, it was said, that courts had, in questions of this nature, gone a great way in endeavoring to perform the will. It was the case of a child, who was, in the opinion of the court, equally entitled with others, to a provision by the father. And it being doubtful from the express words of the will, whether the testator intended to charge the

land, the court made that circumstance the ground of its judgment. "It seems to be the intent of the testator," says sir John Strange, sitting at the rolls, "to provide effectually for every branch of his family; and if the lands are not held chargeable, it is admitted, the complainant must go without a provision."

So in *Webb* v. *Webb*, *Barnard. Rep.* 86; 2 *Eq. Cas. Ab.* 504, the court charged the real estate, under pretty strong circumstances against such charge, on the ground that the legacies were portions for younger children; and held, that they were to be considered as creditors in a court of equity, and not put on the footing of ordinary legatees.

And again, in *Elliott* v. *Hancock*, 2 *Vern.* 143, real estate was held charged with a legacy, without any express words in the will; "the rather, because it was all the provision that was made for the heir that was disinherited."

In all these cases there is equity and good sense, and they commend themselves strongly to the conscience of every court.

Thirdly: There are a number of authorities to show, that where the residuary devisees and the executors are the same persons, the land will be considered charged; for in all such cases the executors have it in their power to fulfil the intentions of the testator, if the personal assets prove insufficient. This doctrine has been somewhat shaken by a late decision of sir John Leach, vice-chancellor, in *Parker* v. *Fearnley*, 2 *Sim. and Stu.* 592; 1 *Cond. Chan. R.* 604; but the principle appears to be sustained in the older authorities.

The executors, in the case before the court, are not devisees, but their wives are; and they took a beneficial interest in the property, which they might have disposed of. There is a strong analogy between this and the cases referred to. And although I am very far from considering it full evidence of intention, yet I think it right to notice it, that it may have such weight as it may deserve.

Fourthly: What appears to me of greatest importance in ascertaining the intention of the testator, is the fact, that at least a part of the legacy is in consideration of lands of the legatee

appropriated by the testator to his own use. It seems that the wife of the testator died seized of considerable real property, and that either by sale in the life-time of the testator, or by his will, the whole was disposed of, and thus was included in the residuum of the estate for the benefit of the two daughters and their husbands. The testator being only tenant by the curtesy, had no right to dispose of these lands in fee. He, nevertheless, did make such disposition of them, and required that the grandchildren to whom they rightfully belonged after the termination of the life estate, should release their interest in them to the daughters. On failure or refusal thus to release, they were to forfeit a large proportion of their legacies.

These facts present a very strong claim as against the testator and against these devisees. This provision in the will was for the interest of the devisees, the daughters. They, as well as their husbands, had a right to call for the release. The testator fully intended they should have that property, and, I think, he fully intended that the grandchildren should be compensated for it out of his own estate.

As to a part of it, the claim is stronger, to my mind, than that of an absolute debt; and from the whole language of the will, taken in connection with the dispositions made in it and the situation of the parties, I am satisfied he intended that part should be paid at all events. A different construction would be unjust to the legatees, and still more unjust to the memory of the testator. As to the other part the intention is not so clear; but when it is seen that the testator took the property of these legatees, and mingled it with his own, constituting thereby one general fund, and gave the whole of it as one property to his daughters, excepting thereout the sum of ten thousand dollars to his grandsons, (five thousand dollars to each,) and that it is given as one legacy, I am strongly inclined, on this point, to believe the intention of the testator was, that they should have the whole of their legacies out of the estate, (if they chose to fulfill the will by executing the necessary releases,) and of course that the land is charged in the hands of the devisees.

I am not prepared to say that any one of the circumstances referred to as indicating the intention of the testator, would, if standing alone, ascertain it with sufficient certainty to found a decree. But when I see that there is a deficiency of personal assets; that there is a residuary clause, not peculiar in itself, but peculiar in reference to the dispositions of this will; that this clause is better satisfied by charging these legacies on the real estate than by a different construction; that it was a provision for infants, and not a common voluntary legacy; and that the property of these legatees has been taken by the testator and mingled with his own estate, to constitute a common fund for the benefit of the devisees, out of which a certain sum is to be paid to these legatees; I feel justified in concluding that the intention of the testator was, that they should be paid at all events; and I shall decree accordingly.

Many rules have been adopted by courts for the construction of wills. In general they are salutary and ought to be observed, although sometimes working injustice. But the great rule which rides over all others is, that the intention of the testator is to govern. That intention is to be gathered, as has already been seen, not from speculations and conjectures, but from the will itself, and its various dispositions, connected with the situation of the property disposed of, and the persons taking. If, after an anxious investigation, guided by a sincere desire to discover that intention from these sources, a conclusion is found, it is satisfactory to believe, as I do in the present case, that it accords with what appears to be just and equitable as between all parties interested.

It was objected at the hearing, that the proper parties were not before the court, inasmuch as the assignees of Baker and wife were not made parties to the bill.

I think the objection ought not to prevail. If the complainant has released to Baker and wife on payment of their proportion, he needs no decree against their assignees. No more is sought from Van Houten and wife, or their assignees, than the proportion due from the moiety of the lands in their possession. If he sought

to recover more than this, the representatives of the other share of the land should be before the court.

There has been a division of the land, and one part has paid its share. Those holding that part, if brought in, would have a right to throw the burden on the other part. And if the complainant does this without the direction of the court, and no allegation is made that the other share is bound to contribute, there is no good reason why the owners of that share should be brought in to increase the expense. They are in no way affected by the decree.

It is accordingly declared, that the share of the real estate of the testator, which in the division made by the devisees was assigned to Van Houten and wife, is charged with the payment of the balance of the legacy now due, in whose hands soever the said lands may now be. And it is decreed that it be referred to a master to take an account of the balance due; and that, upon a proper release being executed according to the will, the defendants pay the amount due in a given time, and in default thereof that it be raised by sale.

This does not appear to be a case for costs.

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The following decree was thereupon made:—

"This cause coming on to be heard, &c. and it appearing to the satisfaction of the chancellor, by the pleadings, proofs and exhibits made and taken in this cause, that Cornelius Van Winkle made and executed his last will and testament, in the complainant's bill set forth or referred to, in manner and form sufficient to pass real estate in New-Jersey, and departed this life without altering or revoking the same; leaving two daughters, Tiney the wife of Adrian Van Houten, and Jane the wife of Stephen Baker; and two grandsons, Cornelius the son of Walling Van Winkle, deceased, and the complainant the son of John Van Winkle, deceased: that in and by said will he gave to each of

aid grandsons an annuity of one hundred and fifty dollars they should attain the age of twenty-one years, and to each em the sum of five thousand dollars, one half thereof to be in six months, and the residue in one year after they should ally arrive at the age of twenty-one years; and he then gave e rest, residue and remainder of his personal and real estate two daughters, Tiney and Jane. That as his wife, Ann Van kle, had died seized of a considerable real estate in Saddle r, in the county of Bergen, which she desired should be lly divided between the two daughters, the testator directed if either of his two grandsons should refuse to release to the daughters and their heirs and assigns, all his right and in- in the said real estate, if requested so to do by the executors e daughters or their heirs, within six months after the said dsons should respectively attain the age of twenty-one years, the sum of fifteen hundred dollars should be deducted from egacy of the one so refusing, to be taken from the first pay- t to be made to him after he arrived at age; which sum de- d was to go to the daughters with the residuum of his the testator's estate; and did appoint the said Adrian Van Hou- nd Stephen Baker executors of said will. That the said utors proved the same, and took upon themselves the burthen e due execution thereof. That the said executors are insol- , or reputed to be so. That after the death of the said Cor- s Van Winkle, the said Adrian Van Houten and Tiney his , and the said Stephen Baker and Jane his wife, made par- of a large and valuable real estate, devised as aforesaid to aid Tiney and Jane; and that the said Adrian Van Houten Tiney his wife, have aliened or incumbered their estate so ed, or some part thereof. And it further appearing that the said plainant, more than one year before filing his bill in this e, arrived at the age of twenty-one years, and that the said hen Baker has paid to the complainant twenty-five hundred rs, being one equal half part of said legacy; and that there considerable sum of money due to the said complainant ccount of his said legacy; and that the complainant has

executed a release to the said Jane Baker for her share of said lands, or has otherwise satisfied her therefor. And it further appearing that there is due to the said complainant a considerable balance, including interest, on his said legacy of five thousand dollars, and that the said Adrian Van Houten is insolvent, and there is no personal estate of the said testator to pay and satisfy the said complainant the balance due to him on said legacy; that it does not appear that either the said executors or the said Tiney Van Houten did, within six months from the time specified in the said will, after the complainant arrived at full age, request the complainant to execute such release to the said Tiney Van Houten, for the said lands in the township of Saddle River, as in the said will is mentioned. The chancellor is of opinion, and doth declare, that the release directed by the will to be made to the said Tiney Van Houten, is not a condition precedent to be performed on the part of the complainant, and that the sum of fifteen hundred dollars, part of said legacy, does not sink into the residuum of said estate, but that the complainant ought to recover the balance, with interest, of the said legacy of five thousand dollars, devised to him as aforesaid, which remains unpaid, and ought also to execute such release to the said Tiney Van Houten as is directed by said will. And the chancellor is also of opinion, and doth declare, that neither the said Stephen Baker and Jane his wife, or their assigns, ought to be made parties in this suit, as they are no way affected by this decree. And it further appearing to the chancellor that the said legacy was a provision for a grandchild of the testator, and one of his heirs; and that the said executors in the said will named, were the husbands of the testator's daughters, who were the devisees of the real estate of the said testator, and derived a benefit therefrom. That a part of said legacy was in consideration of lands of the said complainant to be released, which were appropriated by the said testator for his own use, and for the interest of his said daughters. That from the property of the said testator left at his death, the words of his said will, and circumstances of this case, the chancellor is of opinion, and doth de-

clare, that it was the intention of the testator, Cornelius Van Winkle, to charge his lands and real estate with the payment of the said legacy of five thousand dollars, bequeathed and given to the complainant as aforesaid; and that the share of the real estate of the said testator devised as aforesaid to his said daughter Tiney, and which in the partition aforesaid was allotted and assigned to the said Adrian Van Houten and Tiney his wife, was and now is charged with the payment of the balance of principal and interest of the said legacy, due to the said complainant as aforesaid, in whose hands soever the said lands and real estate may be; and that the said balance ought to be raised by a sale of so much of the said lands and real estate charged as aforesaid, as shall be sufficient for that purpose. It is accordingly, on this thirtieth day of October, in the year of our Lord one thousand eight hundred and thirty-four, by his excellency Peter D. Vroom, governor and chancellor, ordered, adjudged and decreed, and the said chancellor doth, by virtue of the power and authority of this court, order, adjudge and decree, that the complainant is entitled to relief, and the aid of this court, to recover and receive payment and satisfaction for the balance of principal and interest due and growing due on the legacy of five thousand dollars given to him as aforesaid in the will of the said testator; and that the balance of the said legacy, with interest, due to the complainant as aforesaid, is a charge and is charged upon the share of the real estate of the testator, Cornelius Van Winkle, which in the division made by the devisees as aforesaid, was assigned to the said Adrian Van Houten and Tiney his wife, in whose hands soever the same may be, and ought to be raised by a sale of so much thereof as is necessary for that purpose; and that it be referred to Philemon Dickerson, esquire, one of the masters of this court, to take an account of the balance of the said legacy, with interest, due and owing to the complainant, and fix a day for the payment thereof; and that the complainant execute a proper release to the said Tiney Van Houten, of his interest in the said lands in the township of Saddle River, according to the will of the said testator, to be approved of by the said master, and

leave the same with the said master, subject to the further order of this court. That the said master make his report with all convenient speed; and that upon the coming in of the said master's report, the amount which shall be found due by the said master to the complainant, is directed to be paid to him or to his solicitor, according to the said master's report; and in default thereof, that a sale be made of the lands and real estate charged with the payment of the sum due to the complainant as aforesaid, or so much thereof as shall be necessary, according to the further order and decree of this court. And all further equity and directions, and the question of costs, are reserved until the coming in of the said master's report, for the further order and decree of this court."

JOHN DE GROOT et al. v. The RECEIVERS of the WASHINGTON BANKING COMPANY.

A bill brought to establish a legal title, and for a perpetual injunction, will be dismissed. The trial must be at law. The court will interfere by injunction only after repeated trials at law, and for the sake of preventing useless litigation.

THE bill alleges, that the Washington Banking company, being owners of the property in question, by a resolution of the board of directors of said company, authorized John De Groot to sell the same on their account. That, as agent of the company, the said De Groot sold the said property on the twenty-fifth of February, one thousand eight hundred and thirty-three, to one Solomons, of the city of New-York, for the sum of seven thousand dollars. That on the sixth of March, one thousand eight hundred and thirty-three, Solomons and wife conveyed the same property to the said De Groot, for the same amount. That the sale was approved by the board, and De Groot took

possession, and put repairs on the property to the amount of two thousand dollars, and leased it to Zabriskie and Demarest, the other complainants. That in January, one thousand eight hundred and thirty-four, an injunction issued against the bank, and the defendants were appointed receivers. That the receivers, without offering to pay back the consideration or make compensation for the repairs, have brought an action of ejectment to recover possession of the property, pretending that the sale was fraudulent and void.

Prayer of the bill, that the title of De Groot may be established, or if more just, that the defendants be decreed to repay him the purchase money, and all moneys expended for repairs, with interest; that they be injoined from all further proceedings at law, and for further relief, &c.

R. E. Darrah, for complainant.

THE CHANCELLOR. The bill discloses the case of an ejectment brought by a grantor against his own grantee. The defendants in the ejectment, claim under the plaintiffs themselves, and set up a legal title. There are no equitable circumstances connected with it; nothing that prevents a full defence being made at law, or that calls for the peculiar powers of this court. The only question between the parties, so far as I can discover, is a legal question, and properly triable in the court where it now is.

It is a general rule, that when a bill is brought to establish a legal title, and for a perpetual injunction, it will be dismissed: 2 *Bro. P. C.* 39. The trial must be at law. There are cases in which this court will interfere by injunction, but it must be after repeated trials at law, and for the sake of preventing useless litigation.

It does not alter the case, that the suit is brought by the receivers. They stand in the place of the company, the grantors, and will be bound by their lawful acts. And if they intend to

rely upon the ground of fraud in the conveyance, and choose to go into a court of law to sustain it and establish their own title, this court will not interfere to restrain them. The complainant, De Groot, does not allege that he is unable to make a proper defence at law, nor does he seek a discovery to aid him.

Application denied.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

JANUARY TERM, 1835.

MARGARET MORGAN v. SAMUEL TITUS and others.

Where devised premises, charged with the payment of legacies, are in the occupancy and enjoyment of a third person, other than the devisee, the tenant must account for the rents and profits to satisfy the legacies. The rents and profits must go in relief of the land.

A devise to the widow of the use and enjoyment of two rooms and of the kitchen and cellar, during her natural life, is a devise of real estate for her life, and the widow is not entitled to dower unless she shall express her dissent in writing to accept the devise.

The right of the widow to retain possession of the homestead, does not attach where there is no dower to be assigned.

THIS bill was filed by a legatee under the will of Richard Ketcham, deceased, for the recovery of a legacy charged upon land, against the devisee of the land, the tenant in possession of the premises, whose wife was also a legatee under the will, and other legatees whose legacies were charged upon the same land. All the material facts disclosed by the bill and answers, appear in the opinion of the chancellor.

Nevius, for complainant.

J. S. Green, for defendants.

[Morgan v. Titus et al.]

THE CHANCELLOR. The complainant sues for a legacy left her by the will of her father, Richard Ketcham, deceased, late of Hunterdon, who died in 1824. The testator gave to his wife Rebecca, in lieu of her dower right in his estate, the sum of four hundred dollars in legal money of the United States, together with sundry articles of personal property, to be at her own disposal. And he also bequeathed to his said wife, during her natural life, the use and enjoyment of the two rooms she then occupied in his house, the use of the kithen and cellar, and sufficient fire-wood and two cows. He then gave to his daughter, Margaret Morgan, the complainant, the sum of four hundred dollars, payable in two years after his decease, and to his daughter, Julia Duryee, the sum of two hundred dollars, payable in three years after his decease; to be paid out of the landed property devised to his daughter, Amy Titus, and her children. He gave to his daughter Elizabeth, now Elizabeth Stout, eleven hundred dollars, payable in two years, out of the same real estate. He then gave to his daughter, Amy Titus, the use and occupation of the real estate, excepting the aforesaid legacies to be paid out of the same, and the privileges to his wife Rebecca; and after her decease, he gave the farm or real estate, subject to the said reservations, (meaning thereby the legacies and privileges above mentioned,) to the children of his said daughter, Amy Titus, share and share alike.

The bill charges, that the legacy is unpaid, and that soon after the testator's death, Elizabeth, one of the legatees, who had intermarried with Ira Stout, entered with her said husband in possession of the said premises, and that they have ever since enjoyed the same, receiving to their own use the rents, issues and profits. That Samuel Titus and Amy Titus absolutely refuse to pay the legacy, and that the same remains wholly unpaid. The prayer is, that Stout and wife and Titus and wife may account for the rents, issues and profits of the property since the death of the testator; that Titus and wife may be decreed to pay the legacy and interest, or that the lands may be sold to satisfy the same and the costs.

Titus and wife admit the will and the material facts, as charged, but deny that Stout and wife went into possession under them, or with their leave, or that they have ever received the rents, issues and profits; on the contrary, they allege that they did not in any manner accept of the gifts or devise in the will.

Stout and wife allege, in their answer, that when they intermarried, Rebecca, the widow, was in possession of the property; that Elizabeth, (Stout's wife,) was also there, living with her mother, and that Stout was invited to live with them; that there was no contract for renting or hiring, nor was he to be in any manner accountable as a tenant. Stout insists, however, that if he is to account, he ought to be allowed for the money he has expended, which is more than the rent; and that he has made many repairs to the property, which was greatly out of repair when he took possession of it.

Upon the pleadings and evidence, the complainant is entitled to relief. The will is admitted; the legacy is due, and the property is bound for the payment of it. If there were no other persons interested than the legatees, it would be sufficient to direct the amount of the complainant's claim to be raised out of the property; but as the reversionary interest of the property is in the children of Samuel and Amy Titus, nearly all of whom are infants, their rights must be looked at and protected by the court.

Ira Stout, who intermarried with one of the legatees, has been in possession of the farm for several years. He is bound to account to some one for the rents and profits, if any are justly payable. They must go in relief of the land; and before the court will order the land, or any part of it, sold, it must be ascertained how much is in the hands of Stout to meet the charge upon it. To ascertain this, it must be referred to a master in the usual form. If any amount be found due from Stout, it will be for the court to make a proper distribution of it.

Whether Stout and wife, who have set up no claim for the legacy left to Mrs. Stout in the will, or Julia Duryee, who has not answered the bill, are entitled to any part of it, and if any

what proportion it shall be, are matters reserved for future consideration.

The counsel for Stout appeared to insist, that Stout ought not to be charged with the rent, as he came in with the consent of the widow, who was lawfully in possession, and had a right to remain there, it being the homestead. But this cannot be. By the will she had given to her a certain and determinate interest in the realty. It amounted to a devise "of lands or real estate for her life," according to the provisions of the act, entitled, "A supplement to the act relative to dower," (*Rev. Laws*, 677,) and of course the widow could not be entitled to dower in the premises, unless she expressed her dissent in writing to accept the devise. This was not done. If not entitled to dower, she could have no pretension to any right of occupancy further than given by the will; for the right of retaining possession of the homestead does not attach where there is no dower to be assigned by the heir.

It was not necessary, in this case, to make the widow a party, as was supposed by the defendants' counsel. Her rights cannot be affected by any decree the court may make in behalf of the complainant, or others interested. If the property is sold, the sale must be subject to her just rights; and although her feelings and comfort may be greatly affected by a change of tenants, that is no ground for making her a party.

Order of reference accordingly.

JOHN HOOPER EVANS, by his Guardian, v. MICHAEL HAYS, Executor of ELEANOR HOOPER, deceased.

Parol evidence is admissible to prove identity, or show a mistake in the name of a legatee.

THIS was a bill filed for a legacy. In the will the legatee is called James Hooper Evans, and is described as the son of James Evans, a nephew of testatrix. It is proved there was but one

nephew, viz. James Evans; that he lived in the house with testatrix; that a child of this nephew, whose name is John, was a favorite of the testatrix; and that the nephew had no other son, nor any other child, save John, the complainant. The scrivener also proved, that this child was intended by the testatrix, and that he, the scrivener, mistook the name.

There was no other person claiming, and the executor submitted himself to the direction of the court.

Brainerd Clark, for complainant.

Kinsey, for defendant.

THE CHANCELLOR. The case is clear for the complainant. Parol evidence is admissible to prove identity, or show a mistake in the name of a legatee.

In *Beaumont* v. *Fell*, 2 *P. Wms.* 140, a legacy given to *Catharine Earnley* was held good to *Gertrude Yardley*, proof being made that it was intended for her, and no person of the former name being known. See also *Goodinge* v. *Goodinge*, 1 *Vesey*, 231; *Thomas* v. *Thomas*, 6 *D. and E.* 671. The English cases are collected in 2 *Bridg. Dig. Index*, title *Evidence*, III. 84.

In *Neathway* v. *Ham*, 1 *Tamlyn*, 316, (5 *Cond. C. R.* 410,) the master of the rolls directed an inquiry whether the testator, by the words "Mary Bridge, my cousin," in his will, meant a certain person named *Mary Hillditch*, remarking at the same time, that the fact had been so clearly proved, he considered the inquiry an idle one.

In the present case, it is declared, that the legacy was intended to be given to John Hooper Evans, the complainant, and that he is entitled to recover it from the executor.

Let it be referred to a master to take an account of the sum due.

William Young v. Jonathan Bilderback.

On a bill filed by an heir, to avoid the deed of his ancestor, it is necessary that all the heirs of the grantor should be parties to the bill.

This bill is filed to set aside and declare null and void a deed from William Young, the father of complainant, to Jonathan Bilderback, dated January twentieth, 1773; which deed, it is alleged, has been fraudulently altered, so as to give to the grantee an estate in fee instead of an estate for life. The defendant is a son of the grantee, and claims title through his father. The complainant is an heir at law of William Young, the grantor. The bill sets out, that William Young, the grantor, died on the twelfth of March, 1798, leaving two children, viz. James the eldest son, and William the complainant, his heirs at law.

To this bill the defendant demurred; assigning as a ground of demurrer, that James Young is not made a party to the bill, although equally interested in the subject matter of the suit.

W. Halsted, for complainant.

A. L. Eakin, for defendant.

The Chancellor. The demurrer is well taken. The general rule in equity is, that all persons having an interest in the subject matter must be made parties. The complainant seeks to set aside a deed on the ground of a fraudulent alteration affecting the title. James Young is owner of a moiety of the property included in the deed; and if the conveyance is set aside or established, the decree will affect the whole property, and not a part only. The whole title is before the court, and all persons interested in it, and on whose rights the decree may operate, should be here also: *Cooper's Eq. Pleading*, 36; *Harding* v. *Handy*, 11 *Wheaton*, 103.

Demurrer allowed, with liberty to the complainant to amend his bill on payment of costs.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

APRIL TERM, 1835.

Benjamin M. Price v. Samuel Clevenger et al.

Where two defendants are implicated in the same charge, the court always requires the answer of both before dissolving the injunction, without some special reason to the contrary.

* But the neglect or refusal to answer of any defendant not interested in the gravamen of the charge, will not affect the rights of parties really interested.

This was a bill by an execution creditor, to obtain relief against a prior execution as collusive and fraudulent, and to restrain the sheriff from making sale by virtue of such prior execution. The debtor, the prior execution creditor, and the sheriff, were made defendants. An injunction issued, pursuant to the prayer of the bill. Clevenger, the debtor, filed no answer, and a decree pro confesso was taken against him. Wilkinson, the prior execution creditor, having answered the bill, moved to dissolve the injunction upon the answer. The cause was heard upon the motion to dissolve the injunction.

J. W. Scott, in support of the motion.

F. B. Chetwood, contra.

* Accord. *Vliet* v. *Lowmason*, ante, vol. 1, page 404, and note.

Cases cited by complainant's counsel, against the motion. 2 *John. Chan. R.* 148; 1 *Vesey and B.* 497; 2 *Dickens*, 691; 19 *Vesey*, 81; *Wyatt*, 234-6-7.

THE CHANCELLOR. Price, an execution creditor, filed his bill against Wilkinson, a prior execution creditor, and Clevenger, the defendant against whom both executions were issued, charging the judgment confessed by Clevenger to Wilkinson to be fraudulent and collusive, and without any consideration, and that Wilkinson had confessed the fact; and praying an injunction to prevent the sale of the property levied on by the sheriff. The injunction was allowed; and Wilkinson, having put in his answer, denying, as he alleges, the whole equity of the bill, seeks to have the injunction dissolved. Clevenger has not answered, and a decree pro confesso has been taken against him.

It is objected, that the injunction cannot be dissolved, even if the answer is full on the part of Wilkinson, without an answer being put in on the part of Clevenger.

This is the general principle, where there are several defendants, and the injunction issues against them all, or against more than one. All must answer, each one for himself and not one for the other. The complainant has a right to test the conscience of every one who is so situated in regard to the transaction as to be a proper party to the suit: *Wyatt P. R.* 234, 236; *Eden on Inj.* 166.

There are exceptions to this rule, as to most others. It sometimes happens that persons are made parties who are not interested in the gravamen of the charge, and whose answers could have no effect upon it one way or the other. Their neglect or refusal to answer shall not affect the rights of the parties really interested. In the present case, the complainent has seen proper to make the sheriff of the county a defendant. He has not answered, and his failure or neglect to do so forms no objection to this motion, for his answer could be of no importance. He is not charged as participating in the fraud. But where two defendants are implicated in the same charge, the court always

requires the answer of both, without some special reason to the contrary: *De Peyster* v. *Graves et al.*, 2 *John. Rep.* 148.

This case appears to me to be clearly within the principle. The charge is, that Clevenger confessed the judgment and that Wilkinson received the judgment, both knowing there was no consideration; that it was a fraudulent contrivance to protect the property from honest creditors. Wilkinson denies the charge, and sets out the origin and nature of the debt which forms the consideration of the judgment; but Clevenger, though in court, makes no answer, and is willing that a decree pro confesso be entered against him.

The defendant, Wilkinson, appears to think it hard that he should suffer because Clevenger refuses to answer. There may be cases in which an adherence to the rule will work a hardship, but this is not one of them. These men are brothers-in-law. If this is an honest transaction, it seems singular that Wilkinson, who does not appear to have had any difficulty in procuring the judgment, should be unable to procure his co-defendant to put in an answer denying the charges of combination and fraud. No reason is given why this has not been done.

I think the principle is one of great safety and value, and shall order the injunction to stand until the hearing, unless it shall be considered advisable to sell the property, or that part of it which is perishable, and bring the proceeds into court, subject to its further order.

Motion denied.

The TRENTON BANKING CO. v. THOMAS L. WOODRUFF and ANN E. WOODRUFF his wife, and ZACHARIAH ROSSELL, Trustee, &c. — *On Bill.*

ANN E. WOODRUFF, by ZACHARIAH ROSSELL her next friend, and ZACHARIAH ROSSELL, Trustee, &c. v. The TRENTON BANKING CO., THO'S L. WOODRUFF et al. — *On Cross Bill.*

The first mortgagee is entitled to the possession of the mortgaged premises, and being in possession, there can be no receiver as against him.

And although the validity or existence of the first mortgage be disputed, the court will not appoint a receiver as against the first mortgagee, unless it appear that he is unable to respond for the rents.

THIS cause came on for hearing upon an application of the Trenton Banking company, the complainants in the original bill, for the appointment of a receiver to take the rents of the mortgaged premises; or, on the failure of that motion, for the dissolution of an injunction which had been allowed on the prayer of the cross bill, to restrain them from proceeding at law to recover possession of the premises. The material facts are stated in the opinion of the chancellor.

Wilson, in support of the motion.

Wall, contra.

Cases cited in support of the application for a receiver. 2 *Atkyns*, 564; 3 *P. W.* 374; 1 *John. Chan. R.* 57; 1 *Cox*, 422; 2 *Cox*, 378; 1 *Jac. and Walk.* 627; 3 *Atkyns*, 689; 3 *Swanston*, 109; 1 *Powell*, 294, *note E.*; *Ambler*, 311; 16 *Vesey*, 59; 13 *Vesey*, 105.

THE CHANCELLOR. The Trenton Banking company filed their bill on two mortgages, given by Thomas L. Woodruff and

wife. The first one is dated the second day of March, 1821, and conveys *the moiety* of a lot in Second-street, in the city of Trenton. The second one is dated the seventeenth of October, 1823, and conveys a lot and a three-story brick house in Market-street.

The defendants, Ann E. Woodruff and Zachariah Rossell, set up by way of defence in their answer, and also in their cross bill, that on the fifteenth of May, 1821, Thomas L. Woodruff gave a mortgage on both properties to Israel Carle, for a large sum of money; that this was a part of his estate when he died, and was given by the will, with all the residuum of his estate, to his daughter, Mrs. Woodruff, for her sole use, and not to be affected by the contracts or debts of her husband; and that she afterwards constituted Zachariah Rossell her trustee, in whom the right to the mortgage is vested. It is also alleged that this mortgage, after the death of the mortgagee, was improperly cancelled by Thomas L. Woodruff, one of the executors, without the knowledge or approbation of his wife, in whom the right to it belonged, and that, notwithstanding such fraudulent cancellation, it is a subsisting lien on the property in the hands of the trustee, and that the bank had notice of it at the time they became possessed of the said second mortgage.

The trustee is in possession of the property; and the banking company, having brought an ejectment to recover possession, have been injoined by this court.

The application is to dissolve the injunction, or for the appointment of a receiver to take the rents, issues and profits, until it shall be decided who is equitably entitled to receive them.

The injunction, so far as regards the property embraced in the first mortgage, being the moiety of a lot in Second-street, cannot be sustained. There is no dispute whatever as to this mortgage or its priority, and I know of no reason why the mortgagees are not entitled to the possession, or why they should be restrained from pursuing the ordinary means to obtain it.

The injunction as to the remaining part of the property, being the house and lot in Market-street, must be retained till the hear-

ing, or the further order of the court. The equity of the cross bill is not answered in such way as to justify a dissolution.

The most important question, is that which relates to the appointment of a receiver of the property covered by the bank's second mortgage, and which is also embraced in the mortgage set up by the trustee. If the trustee is to be considered as a first mortgagee in possession, the case is plain. There can be no receiver as against him. He is entitled to the possession, having the first or legal mortgage, and can only be required to apply the rents and profits to the payment of the debt. The second mortgagee has no remedy, except to redeem. And the rule is so firmly settled, that in *Quarrel* v. *Beckford*, 13 *Vesey*, 378, lord Eldon said, that if Beckford, the first mortgagee, would swear there was any sum due him, and his mortgage was not satisfied, he would not take away the possession from him. And in *Berney* v. *Sewell*, the same learned chancellor says, "I know of no case where the court has appointed a receiver against a mortgagee in possession, unless the parties making the application will pay him off, and pay him off according to his demand, as he states it himself. I cannot appoint a receiver against these defendants, unless you can bring me their confession that they are paid off, or their refusal to accept what is due to them:" 1 *Jac. and Walk.* 627.

If, on the other hand, the trustee is not to be considered as a first mortgagee in possession, the rule is not applicable.

In considering this question, the court will not decide the rights of the parties upon the matters in issue between them, nor give an opinion that may prejudice either. The case must be taken as it appears upon the pleadings.

The trustee comes into court claiming as a mortgagee. He has presented his claim in such manner as to induce the court to restrain the plaintiffs in the original bill from dispossessing him, although their mortgage is undisputed. The situation of the parties is not varied by the answer to the cross bill, so as to induce the court to dissolve the injunction. His actual possession, and his claim to the legal right of possession, is, therefore, to remain

undisturbed pending the controversy, or at all events until the court shall otherwise order.

I incline to the opinion, that under these circumstances the court should not interfere with the receipt of the rents and profits by appointing a receiver, which is a virtual dispossession of the party, unless it be shown that the trustee would not be able to respond, in case of a decree against him. He is on the state of the case, as presented by the pleadings, a first mortgagee, and he is in actual possession. The rents and profits must go to extinguish the debts; and if it should be decreed that his debt has been paid and his mortgage legally cancelled, he must answer to the plaintiffs.

The plaintiffs appear to consider, that because their mortgage is admitted to be an existing and valid instrument or incumbrance, and the very existence of the other mortgage is in dispute, and not merely its priority, that they ought to be protected during the controversy. They say that they have been restrained from proceeding to recover possession on their mortgage, and that now the trustee should be restrained from receiving the rents and profits, by the appointment of a receiver; both parties would then be upon the same footing. This is certainly a plausible view of the case. But it must be recollected that the plaintiffs were prohibited from going into possession, on the express ground that the party who was in was a prior mortgagee, having, as such, legal rights, but which required the aid of a court of equity to be established; and that the rights of the plaintiffs, as compared with his, were only equitable. The situation of the parties has not been materially changed by the answer. If it had been, the injunction ought to be dissolved. As long as that remains, founded as it necessarily must be, on the principle that the right set up by the trustee is superior to that of the bank, I feel unwilling to interfere.

Suppose the trustee, instead of claiming possession under a prior cancelled mortgage, claimed under a mortgage older in date but younger in registry, than the mortgage of the bank; alleging at the same time, that the bank had full notice of his mortgage at the time their own was taken; and upon that state

of facts, the court had restrained the bank from recovering possession. Would a receiver be appointed as against the party in possession? I incline to think not.

If the complainants are of opinion that the rents are in danger; that the trustee is unable to respond for the amount of them, in case he is obliged to give up the possession, and will make their application on that ground, it will present a new view of the case; and if the ground is supported, the court, as at present advised, will grant the application.

Let the injunction be modified so as to conform with this opinion.

The application for a receiver is denied, but without costs.

JOHN OUTCALT v. WILLIAM DISBOROUGH, junior.

It is a general rule, that the party seeking to be protected by injunction in the possession or enjoyment of real property, must shew a right, and such a right as the court will feel bound upon his own showing to protect against the act of the defendant.

In applications for injunctions to stay waste, the rule is strict. In such cases the parties generally claim under adverse rights; and unless the complainant will show a sufficient title in himself, the court will not interfere, but leave him to his legal remedy.

But where the gravamen of the case is, that the defendant fraudulently purchased the property of the complainant, if the complainant's right is stated in such way as to authorize him to come in and complain of the fraud, and entitle him to relief against it, it is sufficient.

The mere purchase of property at sheriff's sale for a nominal consideration, raises no equity, unless coupled with fraud.*

BILL for injunction and relief, filed November twelfth, 1834. The object of the bill is to avoid and set aside a sale of the com-

* Mere inadequacy of price is not sufficient to set aside a sheriff's sale: *Bank* v. *Hassert, Saxton*, 1; *Executor of Simmons* v. *Vandegrift, Ibid*, 55; *Livingston* v. *Byrne*, 11 *John. R.* 566. See also *Seaman* v. *Riggins*, ante, vol. 1, page 217; *Hoagland* v. *Hoagland*, ante, vol. 1, page 501.

plainant's real estate, made by virtue of an execution issued out of the supreme court of this state, at the suit of one John H. Disborough, against the complainant. The property was sold by Abraham Cruser, esquire, sheriff of the county of Middlesex, on the tenth day of March, 1834, and struck off in two separate parcels, to William Disborough, junior, the defendant in the bill, for the nominal sum of forty-one dollars in the aggregate. A deed in pursuance of the sale, was delivered by the sheriff to Disborough, the purchaser, on the fourteenth of March, four days after the sale. Declarations in ejectment, in the name of William Disborough, junior, as lessor of the plaintiff, were served upon the tenants in possession of the premises, with notice to appear at the November term of the supreme court. The bill charges, that the sale by the sheriff was fraudulent, and that the property of the complainant, worth at least four thousand dollars, was sacrificed for a mere nominal consideration, to the great injury of the complainant. The bill prays that the sale may be declared void, and that the sheriff's deed, executed in pursuance of the said sale, may be set aside and delivered up to be cancelled, or that the defendant may be decreed to reconvey the premises to the complainant; that the complainant may be restored in all things to his rights and property as they existed previous to such sale, and that the defendant may be enjoined from further proceedings at law for the recovery of the premises until the further order of the court. An injunction issued, pursuant to the prayer of the bill. The defendant having filed his answer, moved to dissolve the injunction.

Disborough and *Williamson*, in support of the motion.

C. L. Hardenburgh and *Wall*, for complainant, contra.

THE CHANCELLOR. Two points have been made by the defendant in support of the motion to dissolve the injunction granted in this case. The *first* is, that there is no equity in the bill, and therefore the injunction ought never to have been grant-

ed. The *second* is, that the equity of the bill, if there be any, has been fully answered.

The injunction was allowed upon this case made by the bill; that the sheriff of the county of Middlesex had, under an execution in his hands, advertised certain property in the city of New-Brunswick, and certain other property near South River, in the said county, as the property of the complainant, and which had been levied on as such; that the complainant, not being prepared to pay the money, sent his son, John D. Outcalt, as his agent, to the sheriff at the time and place appointed for the sale, to request an adjournment; that the sheriff, though advised by the defendant, Disborough, that he had no right to adjourn, did, after taking advice from others, and understanding that he had a discretionary power to adjourn, agree to postpone the sale to some future day, and informed the said John D. Outcalt that he would adjourn it; that after the agent went away, the sheriff proceeded with the sale, and sold the property to the said Disborough for a merely nominal sum—the property in New-Brunswick for twenty-one dollars, and the property at South River for twenty dollars; that the property has been in the uninterrupted possession of the complainant for forty years, and is worth at least four thousand dollars; that the sheriff has made out deeds for the same to the said Disborough, who is seeking to dispossess the complainant by ejectment. The bill then charges, that the sale by the sheriff, and the purchase by Disborough, under such circumstances, was a fraud upon the rights of the complainant; was illegal and unjust, a violation of equity, and a sacrifice of his property and estate, under color of the forms of law; and prays an injunction.

The objection to the bill for want of equity, was put upon the ground, that the plaintiff had not set out his title to or interest in the property; that unless that was done, the court could not judge whether there had been any sacrifice of interest by the sale or not, and unless such injury was clearly shown there was nothing to sustain the injunction.

It is a general rule, that the party seeking to be protected by

injunction in the possession or enjoyment of real property, must show a right; and it must be such a right as the court will feel bound to protect upon his own showing, against the act of the defendant. In applications for injunctions to stay waste, the rule is strict. In such cases the parties generally claim under adverse rights; and unless the complainant will show a sufficient title in himself, the court will not interfere, but leave him to his legal remedy: *Field* v. *Jackson*, 2 *Dick.* 599; *Whitelegg* v. *Whitelegg*, 1 *Bro. C. C.* 57. When the title is a disputed one, the injunction will be refused: *Smith* v. *Collyer*, 8 *Vesey*, 89; and lord Eldon said, in that case, he remembered, when if a plaintiff stated that the defendant claimed by an adverse title, he stated himself out of court.

From the very nature of the proceedings in simple injunction cases to stay waste, the propriety of this principle is evident, especially where the defendant is stated to have an adverse claim; and there are many reasons why it should be strictly adhered to, that are not fully applicable to a case like the present. Here the defendant is not stated as claiming under any adverse title or right. Whatever right or title he may have, it is just what he has derived from the complainant, through the sheriff, and no more. The defendant cannot gainsay the title of the complainant, whatever it may be; at least, no such pretence is set up in the bill, and we are of course to look on him as holding simply the title of the complainant.

Again: This controversy does not involve, or call in question, the title of the respective parties. That is not the object of the bill. Nor is it framed in reference to the settlement of any dispute about the title. The gravamen of the case is, that the defendant fraudulently purchased the property of the complainant for a nominal consideration, when it was worth at least four thousand dollars; and if the complainant's right or interest is stated in such way as to authorize him to come in and complain of the fraud, and entitle him to relief against it, I apprehend it is sufficient. My impression is, that the complainant's right is so stated. He sets out in the first place, that the property was levied on by the sheriff as

his property, and sold as his property; that the premises are worth at least four thousand dollars; that he has been in the uninterrupted possession of them for about forty years, and that parts of them are in the hands of tenants holding under a lease from him. He then charges, that the sale was a fraud upon his rights, illegal and unjust, and a sacrifice of his property and estate; and that the defendant is seeking to obtain possession of the premises, and thus deprive him of his property.

If it was property and estate which he has possessed without interruption for forty years, and if such sale was fraudulent and a sacrifice of his estate, he is entitled, prima facie, to be protected against the alleged fraud of the purchaser, until the coming in of the answer and the further order of the court.

The second ground taken for dissolving the injunction is, that the equity of the bill is answered. In this, I think the defendant is right.

The case rests entirely on the charge of fraud in Disborough, the purchaser, in advising the sheriff that he had no right to adjourn, when such adjournment was requested by John D. Outcalt; and in purchasing the property for a nominal sum, knowing that the sheriff had agreed to adjourn. Now Disborough expressly denies that he was present when Outcalt and Cruser were conversing on the day of sale. He denies that he told the sheriff he had no right to adjourn the sale, or that he either urged or advised him not to adjourn it. He further denies that he was present at any conversation, or heard any conversation, between the said John D. Outcalt and the sheriff on the day of sale, or at any other time, in relation to the adjournment of the sale; that he does not know that the sheriff had informed or promised Outcalt that he would adjourn the sale, and believes he did not so inform or promise him.

This is a complete denial of the equity as against Disborough. The simple purchase of the property at sheriff's sale, for a nominal consideration, raises no equity, unless coupled with fraud. He did not instigate the sale. He knew of no agreement between the sheriff and Outcalt, that the sheriff was to

adjourn it to a future day. He did not know that on faith of that promise Outcalt had returned home; and therefore his purchase, though for a nominal sum, must be taken to have been bona fide.

It is charged in the bill that the sheriff promised to adjourn, and then sold in violation of his promise; and it is alleged that this charge is not sufficiently answered. Suppose it to be so, it does not alter the case. Admit the fact as stated, that here was a gross fraud on the part of the officer, can that fraud be transferred to the purchaser and charged upon him, when he knew nothing of it? This defendant is not to answer for the fraud or malconduct of the sheriff. The sheriff is no party to this suit. The purchaser is proceeded against alone, and his answer is sufficient to protect him.

The court does not wish to be understood as intimating, that where a sheriff has thus deceived a party in execution, and proceeded to sell his property at a great sacrifice, in violation of a solemn promise, even to an innocent purchaser, that there is no remedy. It is enough to say, that this bill is not framed to meet a case of that description; and the equity of the case as presented by it having been fully denied, I am of opinion that the injunction should be dissolved.

Injunction dissolved.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

JULY TERM, 1835.

In the matter of the Guardianship of ABRAHAM VAN HOUTEN, a Minor.

Upon the father's death, the mother succeeds him as guardian by nature of her minor child; but when a testamentary guardian is constituted by the father, the natural right of the mother must yield to the will of the father.

To take away from the mother this natural right, the father's intention should be manifest.

Testamentary guardians stand *in loco parentis*, and supersede guardians appointed by the orphans' court.

A testator, after giving the residue of his estate to his infant son, ordering his executors to invest the personal estate and the proceeds of his real estate for his benefit, directs as follows: "I do further order that my executors give unto my said son, A. V. H., out of my estate, a good college education and a decent support until he arrive at the age of twenty-one years:" *Held*, that the right and power of directing the education of the infant is vested in the executors, and that they are entitled to the custody of his person so far as is necessary and proper for the purposes of education.

ON the twenty-second of January, 1834, Brant Van Blarcom and John S. Van Winkle, executors of the last will and testament of Abraham Van Houten, deceased, filed their petition; stating that the said Abraham Van Houten, formerly of the township of Paterson, in the county of Essex, by his last will and

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testament, bearing date on the sixteenth day of February, 1825, after giving divers legacies and bequests, did give, devise and bequeath as follows, (*pro ut* state of the case.) That the testator appointed the petitioners executors of his said will, and died about the fifteenth day of May, 1825, leaving the said will in full force, and also leaving Abraham Van Houten, an infant of the age of about six months, his only child. That the petitioners took upon themselves the execution of the said will and of the trusts therein contained. That after the death of the testator, the said infant remained in the custody and under the guidance and direction of his mother, Rachel Van Houten, until the month of November, 1832, when the petitioners, by the consent of the said Rachel Van Houten, and in execution of the will of the said testator, took the said infant into their custody, and sent him to school near Newburg, in the state of New-York, where he remained for about six months, when he returned home to his mother in Paterson. That the said school being about to be discontinued, the petitioners resolved to send him to another school in Newburg, which in their opinion was a suitable place for his education, and gave notice of such their determination, and of the time when it would be necessary for the infant to go, to the said Rachel Van Houten, who at her own request superintended his preparations for going to school. That at the time appointed, the petitioners called for the purpose of taking the infant to school, when they were informed that the mother, without consulting the petitioners, and against their will, had removed the said infant from home, and kept him and still keeps him from the custody of the petitioners. The petitioners insist, that by the will of the said testator, they are guardians of the estate of the said infant, and also of his person, so far at least as to have the custody and control of his person for the purpose of educating him according to the directions contained in the will of the said testator. The prayer of the petition is, that the said infant may, by the order of the court, be restored to the custody and guardianship of the petitioners, for the purpose of being educated according to the order and directions contained in the said will.

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On the eighteenth of March, 1834, the said Rachel Van Houten filed her petition, stating that Abraham Van Houten, formerly of Paterson, deceased, by his last will and testament, dated the sixteenth day of February, 1835, after divers legacies and bequests, devised as follows, (*pro ut* state of the case,) and appointed Brant Van Blarcom and John S. Van Winkle, executors of his said will. That the testator died on the fifteenth day of May, 1825, leaving Abraham Van Houten, his only child, an infant then aged about eight months. That the executors proved the will, and took upon themselves the execution thereof. That they collected the rents of the real estate, and the interest upon the bonds and other securities, and that the estate in their hands, belonging to the said infant, is amply sufficient for his support and education. That the petitioner is the mother of the said infant, and has been appointed his guardian by the orphans' court of the county of Essex. That by virtue of her letters of guardianship, she hath always had the custody of the person of the said infant until the month of October, A. D. 1832, when he was sent to school at Newburg, with the consent of the petitioner. That the executors have paid the petitioner all moneys necessary for his maintenance and education, up to the month of July, 1832, the last payment having been made in the month of October, 1832; since which time, they have refused to pay for the maintenance and education of the said infant, and the petitioner has been compelled to advance a large sum of money out of her own funds for his support and education, which the executors refuse to repay. The petitioner prays that the executors may be ordered to repay the moneys so advanced by her, and also to pay hereafter to the petitioner, as guardian of said infant, for his maintenance and education, such reasonable sum, and in such payments, as may appear just and proper.

The matter was heard upon the petitions, and upon the following statement of facts agreed upon by the counsel of the respective parties, to be used as evidence in the case, viz.:

"The will of Abraham Van Houten, deceased, and the probate thereof by the petitioners, are admitted; also that letters of guar-

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dianship were granted to defendant by the orphans' court of the county of Essex; that Abraham Van Houten died on the fifteenth day of May, 1825, and that he left an only son, by his wife Rachel Van Houten, who at the time of his father's death was about six months old, and is now the subject of this controversy; that in the month of November, 1832, Brant Van Blarcom, one of the executors of Abraham Van Houten, deceased, went to Rachel Van Houten and informed her that the executors of Abraham Van Houten, deceased, intended to send the said Abraham Van Houten to some school out of Paterson, for the purpose of educating him as directed by the will of his father, he before that time having been at school in Paterson; that he must go to school either at New-Brunswick, New-Jersey, Caldwell, New-Jersey, or Newburg, New-York, at each of which places there was a proper school for him, and that she might choose to which of the three he should be sent; that after some hesitation she expressed a preference to Newburg, as a Miss Shultz, who had formerly resided in Paterson and in whom she had confidence, was then about to open a school there, and if he must go to one of the said three places she wished he might be taken there; that accordingly the said Brant Van Blarcom contracted with the teacher of said school for the tuition of the said Abraham; that he was taken thither by the said Brant Van Blarcom and John S. Van Winkle, and was accompanied by Catharine Van Houten, the daughter of Rachel Van Houten; that he remained there for about six months, at the end of which time he returned to his mother in Paterson, and the cost of his schooling and board was paid by the said executors. About the middle of June, 1833, Miss Shultz having ceased to teach school at Newburg, the said Brant Van Blarcom and John S. Van Winkle, executors, &c. gave the said Rachel Van Houten notice that they should send the said Abraham Van Houten to another school in Newburg on the first day of July then next, which school, on making inquiry, they had ascertained to be a good and proper school for the said Abraham; that the said Rachel then denied the right of the said executors to select a school for the said Abra-

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ham, or to send him to school, or to guardianship over his person for that purpose, but admitted the necessity of his being sent to school to some proper person, and insisted that she had the right to select said school; that she then wished him to be sent to school at Elizabethtown or Caldwell, inasmuch as in case of sickness or accident she would be near him; that she knew nothing about the school at Newburg except what she derived from the executors, but that the school at Caldwell was a good school. The executors objected to his going to Caldwell and insisted on his going to Newburg, as they deemed it best for the boy, as they alleged; but Mrs. Van Houten told them he should not go to Newburg. That the said executors, on the said first of July, 1833, went to the house of the said Rachel Van Houten, prepared and for the purpose of conveying the said Abraham to Newburg to school, pursuant to their notice; but that the said Abraham was not there, but had been conveyed by the said Mrs. Van Houten to school at Caldwell, New-Jersey, about ten miles from Paterson; that this was done without the knowledge or consent of the executors, and that he still continues there and has been there ever since, without the consent and contrary to the wish of the said executors.

"The executors claim, under the will of Abraham Van Houten, the custody of the person of the child, so far as is necessary to their educating him, and the right of selecting the school and sending him to the school selected by them.

"The said Rachel Van Houten was appointed guardian of the said child by the orphans' court of the county of Essex, on the third of July, 1826, and by that authority claims the custody of the child and the right of selecting a school for him, and of seeing him properly clothed and taken care of.

"Since he has been at school at Caldwell the executors have refused to advance money for the clothing or schooling of the said Abraham Van Houten, on the ground that the custody of the said child for the purpose of education had been withheld from the executors under the said will; the expense of clothing and education, so far as they have been paid, except as herein before

stated, have been paid by the said Rachel Van Houten out of her own property.

"It is admitted that the schools at Caldwell and Newburg were, on the first of July, 1833, both good schools, but that at that time the executors knew nothing of the character of either of the schools at Caldwell or Elizabethtown, and Rachel Van Houten knew nothing of the school at Newburg, but that she had the highest recommendation of the school at Caldwell and they the highest recommendation of the school at Newburg.

Barkalow and *E. Vanarsdale*, for the executors.

A. S. Pennington and *I. H. Williamson*, for Rachel Van Houten.

Cases cited by the counsel of the executors. 3 *Salkeld*, 176; *Moseley*, 108; 1 *Vesey, sen.* 90; 4 *Bro. P. C.* 302; 2 *P. W.* 102; 1 *Stra.* 168; 1 *Maddock's Chan.* 271; *Rev. Laws*, 227, sec. 10; 2 *Fonb. Eq.* 247, *note*; *Swinb.* 3, ch. 12.

THE CHANCELLOR. From the petitions filed in this case, and the statement of facts agreed upon, it appears that the question to be settled between the parties is as to the power claimed by each over the person of the infant. The mother, Rachel Van Houten, claims as natural guardian, and also under the authority and appointment of the orphans' court of the county of Essex. Her letter of guardianship bears date the third day of July, 1826.

The executors claim under the will of the testator. After making provision for his wife, and disposing of certain parts of his estate, he gives all the residue of his property to his son Abraham, (the infant,) and orders his executors to rent out all his property lying in the towns of Paterson and Hackensack, and all his other houses and lots, and the proceeds thereof, with the personal estate, to put out to interest, for the benefit of his son, until he should arrive to the age of twenty-one years. Then follows this clause: "And I do further order that my executors

give unto my said son, Abraham Van Houten, out of my estate, a good college education, and a decent support, until he arrives at the age of twenty-one years."

The father, while living, is the natural guardian and protector of his child; and he cannot be divested of the privilege, except under extraordinary circumstances. The statute of Car. 2d conferred on the father a power to appoint testamentary guardians, and the same right exists in this state under an act of the legislature. Where such guardians are appointed, they stand *in loco parentis*, and supersede those appointed by the orphans' court.

In case of the father's death, the mother succeeds to him as guardian by nature; but when a testamentary guardian is constituted by the father, the natural right of the mother must yield to the will of the father. It is paramount, and is considered a continuation of the father's authority. To take away from the mother this natural privilege, the father's intention should be manifest. The words are not important, for the intention will govern: *Swinb.* pt. iii. c. 12.

This is a question of construction, and if the rule of law were settled the court would conform to it; but the cases on the subject are few and unsatisfactory.

In *Bridges* v. *Hales et al.*, *Moseley*, 108, the testator said, "I desire that my son and daughter may be under the care and direction of sir Thomas Hales and Mrs. Hales;" and it was held to amount to the appointment of a guardian. That case is more full, and leaves less room for doubt, than the present. The care and direction of an infant, would seem almost necessarily to imply the guardianship; and it does not appear in that case that the mother was living.

In *Mendes* v. *Mendes*, 1 *Vesey*, 90, lord Hardwicke said, the declaration that the wife shall have the education of the children, may amount to a devise of the guardianship; but he does not decide that it will in all cases, or even as a general rule. It might have done so in that particular case, for the person claiming was the mother, who had the natural right.

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It is given in 3 *Salk.* 176, as a rule of the civil law, that the guardian is to educate his pupil, *pro facultate patrimonii et dignitate natalium;* and this word, education, is said to comprehend food, raiment, lodging, physic and schooling.

In these authorities there is nothing definite to guide us; yet it would seem that the leaning of the courts has been rather in favor of the right set up by the executors.

Not being bound by any judicial decisions or course of practice in the courts, I feel at liberty to take such order in the premises, as a fair interpretation of the will and the justice and equity of the case before me appear to require.

And I think, in the first place, that by a just construction of the will in question, the executors are not constituted guardians of the person of the infant, so as entirely to supersede the natural rights of the mother, or those derived under the authority of the orphans' court. The intention of the testator is not so apparent to my mind, as to justify such construction. When the will was made, the infant was at the breast, and it cannot be presumed that the father intended to give the absolute guardianship of him to strangers in preference to the mother.

I am, nevertheless, clearly of opinion, that the duties of the executors are not limited to the mere furnishing of the money necessary for the education of the infant. They are to give him a good college education. They are not only to provide the means, but they are to see that the thing is done; and for this purpose it is necessary that they should have some power. This must be either a power of supervision, or a power of direction. If of supervision merely, then it will be the duty of the executors to supply the necessary means; and if they are improperly appropriated, or not appropriated at all, to make application to this court for such aid as may be suitable to the exigency of the case. If of direction, then it appertains to the executors, when the infant has attained a proper age, to direct and control his education, by selecting the place or places where he shall be instructed.

In my judgment, it is the power of direction, and not of supervision merely, that belongs to the executors in this case. This

opinion is founded on what I consider to be a just construction of the will, as well as in the reason of the thing. The executors are to give the education out of the estate. It is a duty coupled with a trust. They are bound to supply means, but the amount and the manner of application, in its fullest extent, is clearly within their discretion. To give a good education, it is necessary that proper steps be taken early in life, and they must be diligently pursued till the matter is accomplished. In taking and pursuing these, soundness of judgment is to be preferred to tenderness of affection. There must be laid down and maintained a course of moral discipline, as well as mental training; and for this purpose much discretion is needed in selecting the persons under whose immediate care and government the infant is to be placed.

Generally speaking, the mother of an only son, is not the most suitable person to be charged with these important trusts; and hence it frequently happens that fathers, by their last wills, give the care and guardianship of their children to friends. In this case, the testator does not order the mother to give the education to the infant, and that the executors shall defray the expense out of the estate. If he had so ordered, it would have been conclusive. Not having done so, it affords ground for the opinion that such was not his intention. This opinion accords with what I consider to be the reason of the thing; and I feel satisfied, under these circumstances, to say, that the power of directing the education of the infant is vested in the executors.

Having settled the principle, the court feels bound to add, that the power of the executors is very far from being an absolute power, to be exercised arbitrarily and at their mere caprice. It should be exerted tenderly and discreetly, and with a constant reference to the views and feelings of the mother. It is right that she should be consulted as to the disposition of her son, and her desires gratified, if they may be consistently with his interest. In case of a difference of opinion, that of the executors is to prevail. But the mother ought to know, and the executors

should always remember, that in case of any abuse of power, or any impropriety of conduct on the part of the executors, this court will always be open to hear complaints and redress grievances. It will look with a vigilant eye upon the conduct of those who are entrusted with the education of orphans, and whatever is wrong will speedily be made right. The general jurisdiction of chancery over them is complete, and the mother has a right to come in at any time and be heard as against these executors. If, to use the language of lord Macclesfield, the court shall have reason to suspect that the infant is likely to suffer by the conduct of the executors, or if they choose to make use of methods that may turn to the prejudice of the infant, the court will interpose and order the contrary: *Duke of Beaufort* v. *Berty*, 1 *P. W.* 705. The executors are invested with a delicate and responsible trust, and the court will interfere against their acts, if acting in a manner inconsistent with their duty: 2 *Kent*, 186; *Jac. R.* 245: 4 *Cond. Chan. R.* 119, *Lyons* v. *Blenkin*. So the chancellor may at any time inquire whether the course of education pursued is such as it ought to be, and whether the school at which the infant is placed is a proper one.

It may be remarked, also, that the power of the executors is not to be extended by implication beyond what is reasonable and proper. It is not that of a guardian, and therefore when the child is not at school, he is to be under the care and protection of the mother; and she is at no time to be deprived of access to him, or prevented from ministering to his wants. In no event is he to be removed without the jurisdiction of the court without the consent of the mother, or the leave of the court.

The infant has been at the school in Caldwell upwards of a year. The court does not think it necessary to remove him thence, simply as evidence that the executors are reclothed with their proper authority. He must be considered as from this time under their control while he remains there. And as changes are frequently injurious, and no complaint has been made of the school where his mother placed him, he is not to be removed thence without having it referred to a master to report upon the

expediency of such a measure. Such reference will be made at any time, upon proper application.

The executors will refund to the mother the amount disbursed by her since the first of July, 1833; and, as the court sees no cause to censure either party, it is right that the costs of both petitions, and the proceedings thereon, be paid by the executors out of the infant's estate.

Something was said at the hearing as to the jurisdiction of this court, seeing that the mother claimed authority under a letter of guardianship issued by the orphans' court. I do not perceive that this appointment creates any difficulty. It gives the guardian all the power over the person of the ward, that could be given under the circumstances of the case; and this may be exercised consistently with the rights of the executors. These, although limited in extent, are, as far as they go, paramount and superior. Nor is it necessary for the executors to resort to a certiorari to have the letters revoked. The parties are now before the proper tribunal, and this court has power to do equal justice to all parties concerned, and regulate their respective rights and duties. The letters of guardianship are general, extending to both person and property, and they can be in no other form when emanating from the orphans' court: *Ten Brook* v. *M'Colm and ux.*, 7 *Hals.* 97. Yet it will hardly be contended that they give a power to the guardian over the property of the ward; or that the executors, who have the power under the will, cannot exercise it until these letters are annulled and set aside.

It is accordingly declared, that the right and power of directing the education of Abraham Van Houten, the infant, is by the last will and testament of Abraham Van Houten, deceased, vested in his executors, and that they are entitled to the custody of his person so far as is necessary and proper for the purposes of education.

And it is ordered that the said infant shall at no time be taken without the jurisdiction of this court, unless by the consent of the mother or the leave of the court; and that the mother shall at all times have free access to him, and when not at school he shall be under her care; that he be not removed from his present school

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without a reference to a master; and that all parties be at liberty to apply to this court for direction.

And it is further ordered, that the expenses of the mother since the first of July, 1833, and the costs of both petitions and the proceedings thereon, be paid by the executors out of the estate of said infant.

Samuel Boulton et al. v. The Administrators of Jonathan Scott et al.

The decree of the orphans' court upon the final settlement of the accounts of administrators, adjudging that due and legal notice of such settlement was given, is final and conclusive, and this court cannot afterwards inquire into the fact of notice.

In the exercise of the power of the court to relieve against fraud, the court will extend its aid for the relief of parties, whether the subject infected with fraud be a simple contract, a deed or a judgment.

Judgments of courts of law are liable to be relieved against on account of fraud in the procurement of them, and the same principle applies to decrees on judgments of the orphans' court.

The act declaring the sentences and decrees of the orphans' court final and conclusive, only places them on a footing with other courts, and does not at all interfere with or abridge the jurisdiction of the court of chancery over the same subject matter.

It is not enough that the orphans' court may have erred in judgment as to a subject matter properly before them; they must have been led into error by some fraudulent and unconsciencious act or omission of the party to be benefitted, or this court can take no cognizance of it.

It is not the province of a court of equity to review the sentences or judgments of other tribunals, to ascertain whether they have erred in the exercise of their judicial power and discretion in matters over which they had complete jurisdiction.

Legatees cannot call upon the administrator of the executor of the will for the payment of legacies. Such administrator must account with an administrator de bonis non of the testator, and the administrator de bonis non must account with the legatees.

Bill by residuary legatees for an account, and for payment of the balance found due, filed June twenty-sixth, 1832. The

cause was heard upon bill, answer, replication and proofs. The material facts disclosed by the pleadings and evidence, are contained in the chancellor's opinion.

A. Brown and *Wall*, for complainants.

Wilson and *Southard*, for defendants.

Cases cited by defendants' counsel. *Rev. Laws*, 777, 787; 3 *John. Chan. R.* 375; 2 *Vesey*, 135; 2 *John. Chan. R.* 512; 1 *Sch. and Lef.* 201.

THE CHANCELLOR. This is a bill by residuary legatees, for an account generally, and for payment of the balance found due. Priscilla Scott died in 1797, leaving a last will and testament, of which Jonathan Scott was appointed the executor. After ordering her debts and expenses to be paid, and making some small bequests, she gave the residue of her estate, all of which consisted of personal property, to the children of her two daughters, Hannah Boulton and Esther Johnson, to be paid to them in equal portions as they should severally arrive at age. The inventory amounted to three hundred and seventy-nine pounds eleven shillings and eleven pence—equal to one thousand and twelve dollars and twenty-six cents; and the bill charges that after paying the debts and expenses, there remained in the hands of the executor a considerable balance as the residuum of the estate. That the said executor paid at different times to each of the residuary legatees under the will, the sum of twenty pounds in the whole, and no more; and without having made any settlement of the estate in the orphans' court, he departed this life in 1831, intestate; whereupon administration upon his estate and effects was granted to Henry Scott and Robert J. Sutton. The bill then, after stating various pretences of the said defendants, and among others, that the said administrators had obtained letters of administration de bonis non cum testamento annexo, of the goods, rights and credits of Priscilla Scott, deceased, in February, 1831, and

in August of the same year exhibited their account of the estate of the said Priscilla Scott, to the orphans' court of Burlington, for allowance, and that the same was allowed and the balance struck and ascertained; and that the estate of Jonathan Scott is exonerated from all claims beyond the balance appearing by said account to remain in the hands of the said administrators. Charges that the complainants had no notice whatever of the intention of the said Henry Scott and Robert J. Sutton to exhibit such account to the orphans' court, until after the decree obtained; that there is fraud and mistake apparent upon the face of the account, inasmuch as they have neglected to charge themselves with interest on the balance in their hands; wherefore the complainants submit that the pretended settlement constitutes no legal bar to the recovery of their just claims. There are other charges not material to be adverted to. The bill prays for an account of all and singular the estate of Priscilla Scott, which came to the hands of the said Jonathan Scott in his life time, or which was received by him or any other person by his order or for his use, &c., and that the residue may be paid to the complainants.

The answer of the administrators of Jonathan Scott, stating themselves to be also administrators of Priscilla Scott, de bonis non cum testamento annexo, admits the will of Priscilla Scott, the inventory, &c. It states that they loaned eight hundred dollars to one John Hoskins, on his bond, and that he was in flourishing business; that he paid the interest for fourteen years, and in 1820 became insolvent; that the administrators received ten per cent of the amount due, being all that could be obtained. The administrators admit that Jonathan Scott, as executor, did not render an account of his administration of the estate, and allege that they do not know what amount came to his hands.

They admit that after the death of Jonathan Scott, they took out letters of administration upon his estate, and also letters of administration with the will annexed upon the goods, &c. of Priscilla Scott, not administered. Finding no account of the property of Priscilla Scott, that had come to the hands of Jonathan Scott, they caused or procured an appraisement to be made

on the nineteenth of May, 1831, amounting to twelve hundred and thirty-seven dollars and forty-four cents, and filed it in the surrogate's office. They have received no goods or chattels of the estate of Priscilla Scott, except so far as the receipt of the estate of Jonathan Scott shall be considered a receipt of the estate of Priscilla Scott, to the amount in his hands at the time of his death. That on or about the thirtieth of June, 1831, they exhibited to the surrogate their account of so much of the estate of Priscilla Scott as came to the hands of Jonathan Scott in his life time, or to their hands as administrators, and of his and their payments out of the same; which account, after being audited, was allowed at August term, then next; that notice was given of their intention to exhibit their account, and no exceptions were made to the same. They insist, therefore, that the complainants had legal notice of the intention of the said administrators to exhibit their account, and that the decree is binding and conclusive upon the complainants. They deny the charge of fraud or mistake, and allege that even if there should be fraud and mistake that the account is final, unless such fraud or mistake be proved to the orphans' court, and upon such proof a resettlement of the account be ordered by the orphans' court.

Considerable testimony was taken respecting the alleged loss of the money loaned to Hoskins, but the whole of it was very properly laid out of the case upon the argument. The evidence is not such as to authorize any claim for allowance.

The defendants admit the claim of the complainants to a certain extent; that is to say, they admit there is in their hands as administrators de bonis non cum testamento annexo of Priscilla Scott, deceased, the amount found due from them by the decree of the orphans' court, and for which they are ready to account. With this the complainants are not satisfied. They insist that inasmuch as the decree was made and the account passed without lawful notice, and as there is fraud and mistake in it, it forms no bar to their claim for a general account. In answer to this, the defendants allege that there was lawful notice, and that if it be a proper subject for the inquiry of this court at this time, the

evidence is sufficient to prove it. They deny the charge of fraud or mistake, and set up in their answer that this court has no jurisdiction or authority to look into that question; that by statute it belongs exclusively to the orphans' court, and that the application for redress should be there.

1. As to the notice given by the administrators. Upon this point, the judgment and decree of the orphans' court is final and conclusive on this court. It cannot review the decree of the orphans' court, nor consider it as a nullity. That court has adjudicated upon the subject, and it has decreed that due and legal notice of the intended settlement was given. That fact forms a part of the sentence of the court; and that sentence being now set up as a bar, this court cannot go into the question of irregularity, but must take it that the fact was properly and sufficiently proved. I do not mean to say that the want of legal notice might not be assigned for cause of error, in a proceeding fitly brought, to reverse and set aside the decree, before a proper tribunal. With that question I have nothing to do. I desire to be understood as simply saying, that the fact that these defendants, as administrators de bonis non, &c. of Priscilla Scott, gave notice that they would settle their account as such administrators, must be taken as conclusively settled by the orphans' court.

It will be observed that there is no charge of fraud connected with the charge of want of notice. It is not alleged that under an insufficient notice they proceeded to settle matters that did not appertain to their office, and that they made such notice a cloak and thereby deceived others. Something of that kind was hinted at in the argument; but there is nothing of it charged in the bill. That seeks to avoid the decree upon the final account, on two grounds only; the one is want of notice, the other fraud and mistake apparent on the face of the account itself. I think that upon general principles, well established, this court cannot inquire into the fact of notice. Such was the opinion of the court in the case of *Burtis* v. *Adm'rs of Hopkins*. To a bill for an account and to avoid a settlement of an insolvent estate, made in the orphans' court of the county of Monmouth, on the ground that the

decree had been obtained without giving the proper notice required by the act, the defendants set up the decree itself by way of plea, and the plea was allowed.

But if I should be in error on this point, I am of opinion that the fact of notice is sufficiently established. The court, upon the allowance of the account, certify, that it appears to them that it has been advertised according to law; and this certificate is founded on the affidavit of the two administrators, taken before the surrogate in the usual form. Besides this, two witnesses have testified to having seen notices posted up in public places in the county. One saw a notice at Rogers's public house in Burlington city, and the other saw one at Bustleton in said county; both informing that the defendants, as administrators of Priscilla Scott, deceased, intended to exhibit their final account at the August term (1831) of the orphans' court of the county of Burlington. This evidence, I apprehend, would be sufficient, if it were incumbent on the defendants to establish and prove the fact.

2. The next ground taken by the complainants is, that there is fraud and mistake apparent on the face of the account; and therefore they are entitled to have the account restated, it forming no bar to their claim.

The defendants, as has already been stated, deny the fact, and they deny the jurisdiction of the court to inquire into the fact.

It will be proper to ascertain, in the first place, whether the court has jurisdiction. If it has not, it will be saved the trouble of an investigation.

Fraud is one of the most extensive and useful heads of equity jurisdiction; and in the exercise of its power under this head, the court has exerted its aid for the relief of parties, whether the subject infected with fraud was a simple contract, a deed or a judgment. The judgments of courts of law are liable to be relieved against, on account of fraud in the procurement of them; and such has been the practice of this court from the earliest periods of its history. Vide *Barnesley* v. *Powell*, 1 *Vesey*, 289. Awards, if fraudulently obtained, may be set aside in equity: *Brown* v.

Brown, 1 *Vernon*, 157, and the cases there cited, (Raithby's edition.) A court of equity will give relief against a verdict fraudulently obtained: *Bateman* v. *Willoe*, 1 *Sch. and Lef.* 205; and against the probate of a will procured by fraud, 1 *Ves.* 290. And it has even been held that a private act of parliament, obtained upon fraudulent suggestions, may be relieved against: 2 *Comm.* 346; *Hargrave's Jur. Argum.* v. 2, 392; *McKenzie* v. *Stewart*, *Dom. Proc.* 1754; *Cruise Dig. Tit.* 33; *Private Act*, 50, 51. A decree of this court, obtained by fraud, may be set aside upon an original bill, in the nature of a bill of review: *Mussell* v. *Morgan*, 3 *Bro. C. C.* 74; *Richmond* v. *Tayleur*, 1 *P. Wms.* 734; *Loyd* v. *Mansell*, 2 *P. Wms.* 73.

It is unnecessary to multiply authorities on so plain a proposition. The general principle can admit of no dispute at this day, and it must apply to decrees or judgments of the orphans' court equally with the judgments of other courts, unless there be some special exemption in favor of that tribunal. This exemption is set up and attempted to be maintained by the counsel of the defendants. They contend that the account is final and conclusive by the act relating to the settlement of accounts in the orphans' court, except in certain cases of fraud or mistake; in which cases the party injured may apply to have the account opened and restated; and that the resettlement must be by and in the orphans' court, and none other. This position cannot be maintained upon principle. It is founded on an erroneous view of the general power of this court, and the true construction of the act of the legislature. When the act declares the sentences and decrees of the orphans' court final and conclusive, it only places them on a footing with the judgments of other courts. It does not take away the general jurisdiction of the court of chancery. It certainly does not in positive terms, and it is not called for by necessary implication, even if such result could be produced by implication. So when the statute gave the orphans' court power to open its own decrees upon certain conditions, in cases of account, whereby important facilities were afforded to the correct administration of justice, it

did not intend to say, that the court of chancery should have no power to interfere upon its own acknowledged principles. Giving certain powers to the orphans' court, cannot divest this court of similar powers. Those who choose may still come here, where the conscience of the defendant may be tested, and where the means of relief are more ample and satisfactory.

This question is not a new one. It was raised and much discussed in the case of *Burtis* v. *Hopkins*, before referred to. Chancellor Williamson then, in a very learned and conclusive opinion, repudiated the doctrine now contended for, and decided that our statutes in regard to the settlement of accounts in the orphans' courts, did not at all interfere with or abridge the jurisdiction of this court over the same subject matter.

The following is an extract from the opinion delivered in that case:—"But it was argued that the legislature have, by positive enactment, declared that the sentence or decree of the orphans' court on the *final* settlement and allowance of the accounts of executors, &c. shall be conclusive upon all parties, and exonerate and discharge them from the demands of creditors, except in the cases there provided for. But this provision was only intended and designed to make the decrees of the orphans' court as conclusive as the judgments of other courts; and the general principle is, that the judgment of every court of competent jurisdiction, directly upon the matter, is conclusive in any other court: *Bull.* 243, 244. But fraud infects the judgment itself, and, in the language of lord Hardwicke, annuls the whole in the consideration of this court. Nor can the authority given to the orphans' court to correct their own sentences and decrees, where a party applying for a resettlement shall prove some fraud or mistake therein to the satisfaction of the said orphans' court, oust this court of jurisdiction. But it does most clearly prove, that the legislature had no intention to afford protection to fraud. This provision was evidently intended to give to those courts authority to correct their own decisions, where some estate not inventoried or accounted for, should afterwards be discovered, or where an allowance of some item had been fraudulently obtained, or some

mistake intervened in the settlement. And it is a very just and wise provision, as in many cases such frauds and mistakes can be detected and corrected in the court settling their accounts, with less expense and delay than must inevitably attend a suit in this court. But that authority inherent in the orphans' court, does by no means supersede or render unnecessary the power of this court to relieve against their decrees when fraudulently or collusively obtained. The courts of common law have authority to set aside their own judgments when obtained fraudulently, but recourse, nevertheless, is often necessarily had to a court of equity to relieve against their judgments, where a discovery may be had, and the whole transaction sifted to the bottom, through the oath of the fraudulent party, and where in many cases more effectual relief may be had. It has been observed by the author of the Commentaries, that in various kinds of fraud a court of equity assumes a concurrent jurisdiction, not only for the sake of a discovery, but for a more extensive and specific relief. And again, that from the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud, all matters in the private knowledge of the party, which though concealed are binding in conscience, and all judgments at law obtained through such fraud or concealment; and this, not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment obtained by suppressing the truth, and which, had the same facts appeared on the trial as are now discovered, he would never have obtained at all."

Upon the strength of this opinion, and the cases which have been cited, all founded upon the general law and practice of the court, I think there can be no doubt that this court has power to relieve against the decrees of the orphans' court, where there is fraud apparent on the face of them, or where they are fraudulently obtained.

It remains, then, to inquire, whether there be in this case such fraud as will call for the interference of this court.

The charge in the bill is, "that there is fraud and mistake

apparent upon the face of the said account, in that while the said accountants pretend to charge themselves as well with such parts of the estate of the said Priscilla Scott, deceased, as came to their hands, as with such parts thereof as came to the hands of the said Jonathan Scott, deceased, in his life time, they have in fact charged themselves only with the amount of the inventory and appraisement so as aforesaid made of the estate of the said Priscilla Scott, deceased, by the said Jonathan Scott, and the interest he received on the obligations set forth in the said inventory; allowing no interest whatsoever on the residue of the estate of the testatrix, from the time when the account ought to have been settled, to wit, within one year after the death of the said testatrix, up to the time of the said decree of the said orphans' court." The complainants therefore submit, that the said pretended settlement, showing such fraud and mistake, is no bar to their just claims.

It appears that the inventory was made in August, 1797, and amounted to three hundred and seventy-nine pounds eleven shillings and eleven and a half pence. It was all convertible into money. The vendue of the goods and chattels took place in September, 1797; and on comparing the vendue list with the inventory, there appears to have been no loss, but rather a gain. The debts were few and of small amount, and were speedily paid, and it is fair to suppose that the balance of the property was in hand to meet the exigencies of the estate. A portion of each legacy was paid to the several legatees as they came of age. The last two payments were made in 1825. The court have charged the accountants on the debit side of the account with the amount of the inventory, and with interest to the amount of eighty-four pounds nine shillings and seven pence—two hundred and twenty-five dollars and twenty-five cents; and after deducting the sums paid for debts and expenses, and also the payments made on the legacies, they decreed a balance in the hands of the administrators of one hundred and eighty-seven dollars and eighty-four cents. I am satisfied that this amount is much too small, taking the documents as a guide. I have made a calcu-

lation of the account, charging interest on the balance in hand at seven per cent up to 1824, and at six per cent from that time up to 1831, and deducting all the allowances on the credit side of the account, and according to that calculation there should be in the hands of the administrators about five hundred dollars more than is adjudged to be there by the decree of the orphans' court. This does not appear to be just or equitable. It would seem that even if the full amount of interest was not actually received by Jonathan Scott, it ought to be accounted for, on the principle that it might have been received with due and proper diligence.

It does not appear to be right; and yet I am unable to come to the conclusion, that this is such a fraud as will authorize this court to interfere and treat this decree as a nullity. I can discover no fraud in the procurement of this decree; nothing like a concealment or misrepresentation of facts or circumstances, whereby the accounting officer or the court could have been misled or deceived. Nothing appears here that did not appear before the orphans' court. That court were the proper and legal judges of the amount of interest with which the accountants were to be charged according to the circumstances of the case. They investigated the subject, and adjudged upon it. Their judgment may be erroneous; they may have thought proper to charge no interest, on the ground that none was received, or upon some other ground which cannot now be ascertained. This court is not, therefore, to conclude that it was occasioned by fraud or concealment on the part of the administrators.

There are very many cases where accounts are settled in the orphans' court, in which it will appear upon inspection, that the full amount of interest which might be charged according to the face of the account, has not been charged. It would be a dangerous doctrine to establish, that in all such cases the decrees should be considered as nullities; or that, upon a bill filed, the deficiency of interest should be considered sufficient evidence of fraud in the decree. It is not enough that the orphans' court may have erred in judgment, as to a subject matter properly be-

fore them; they must have been led into error by some fraudulent and unconscientious act or omission of the party to be benefitted, or this court can take no cognizance of it.

The case of *Richmond et ux.* v. *Tayleur*, 1 *P. Wms.* 734, was where a bill was filed by husband and wife to set aside a former decree obtained against the wife while an infant, by fraud and collusion. Lord Macclesfield said, if any fraud or surprize upon the court had been proved, he would have set aside the decree; but on the contrary, it appeared that the court was fairly and fully apprized of the case, of the articles, and of the point in question, and had thought fit to make a decree, which, as it might be a just one, therefore he would not set it aside. In another report of the same case, the court is reported as saying, that inasmuch as the decree was not fraudulent, though in every respect not so equitable, the court would not set it aside: 1 *Will. Rep.* 734. From this it would appear, that although a judgment may not be entirely just or equitable, yet unless it be infected with fraud, the consideration or propriety of the judgment cannot be inquired into; and such is the opinion of the court in *French et al.* v. *Shotwell*, 6 *John. Chan. R.* 235.

This is the true doctrine of the court. It will not undertake to review the sentences or judgments of other tribunals, to ascertain whether they have erred in the exercise of their judicial power or discretion in matters over which they had complete jurisdiction. This is not the province of a court of equity. It sits not in judgment on the lawful acts of other tribunals, however mistaken those acts may be. It seeks to detect and relieve against fraud in the procurement of such acts. It deals with the consciences of parties, and not with the opinions of courts.

It was wisely said by lord Redesdale, in *Bateman* v. *Willoe*, 1 *Scho. and Lef.* 204, that if a matter has already been investigated in a court of justice, according to the ordinary and common rules of investigation, a court of equity cannot take on itself to enter on it again. And in the same case, the chancellor says, "there may be cases cognizable at law and also in equity, and of which cognizance cannot be effectually taken at law, and

therefore equity does sometimes interfere; as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law; so where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using; but without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction:"—pages 205, 206.

Under this view of the case, I am clearly of opinion that the complainants have failed in establishing this charge of fraud, which is the only one that could avail them, in avoiding the decree of the orphans' court.

There was another charge set up in the argument. The complainants contended that the administrators, in their capacity of administrators de bonis non of Priscilla Scott, had settled the whole estate of Priscilla Scott, as well that part which had come to the hands of Jonathan Scott the executor, as that which had come to their own hands as administrators de bonis non; that this was calculated to deceive parties interested, and ought not to be held conclusive.

I consider this quite too technical a matter to be the foundation for a charge of fraud, even if the complainants were right in their view. I apprehend, however, that the settlement, as made by the defendants, in their character of administrators de bonis non of Priscilla Scott, was properly made. As administrators of Jonathan Scott, they did not represent Priscilla Scott. When Jonathan Scott, the executor, died intestate, Priscilla Scott was also intestate. The right to settle or meddle with her estate was not in the administrators of Jonathan Scott, as such. It belonged to the law to appoint a suitable person to take charge of that estate, for the benefit of those entitled. The legatees could not call on the administrators of Jonathan Scott for payment of the

money due them under the will. Such administrators must account with an administrator de bonis non, and the administrator de bonis non must account with the legatees—for he only represents the estate of the testator. It is the duty of the administrator de bonis non to collect the whole estate, whether outstanding or in the hands of those who represent the deceased executor; and settlement by the administrator de bonis non, must necessarily be of the whole estate unadministered, and must be final. It appears to me, then, that there was nothing irregular or erroneous in the mode of settlement.

If there be any irregularity, it is rather on the part of the complainants, who have proceeded against the defendants as administrators and representatives of Jonathan Scott, and not as representatives of Priscilla Scott. As they have answered in both characters, without exception, and admitted themselves liable to a certain amount; have contested the charge of fraud; and as the matter has been fully investigated, and complete justice may be done, it would be a useless expense to turn the parties round at this stage of the case. The proceedings would be more regular if the process were amended so as to reach the defendants in both characters.

The complainants are entitled to a distribution of the amount in the hands of the administrators, according to their respective rights, with interest from the date of the decree of the orphans' court, and they are entitled to their costs out of the estate.

The bill must be dismissed as against the heirs at law of Jonathan Scott, deceased; and as there is no allegation in the bill of the personal assets of Jonathan Scott being insufficient for the payment of claims against his estate, and the sum in dispute was at most but small, it must be dismissed as to them with costs.

Decree accordingly.

WILLIAM BAILEY et al. v. WILLIAM STILES et al.

An express denial in an answer of a fact of which the defendants admit themselves to be ignorant, is not a satisfactory denial of the complainant's equity.

If an injunction is prayed for in the bill, but is omitted in the prayer for process, an injunction ought not to issue without an amendment of the bill.

THE complainants filed their bill for the discovery and production of the will of Benjamin Bailey, deceased, and for the establishment of said will. The complainants claim to be devisees under the will, and charge that the will was destroyed after the testator's death.* Actions at law having been instituted by the defendants for the recovery of part of the devised premises, application was made for an injunction to restrain proceedings at law. The cause was heard upon motion for the injunction. The chancellor having been concerned as counsel for one of the parties, the matter was referred to Elias Vanarsdale, esquire, one of the masters of the court, before whom the motion was argued.

J. W. Miller, for complainants.

S. Scudder, for defendants.

THE MASTER. The chancellor having been concerned as counsel for one of the above parties, and an application to him for an injunction having, by his order, and a consent in writing which is filed, been referred to me; and the counsel for the complainants, and also the counsel for the defendants above named, having appeared before me, and submitted said application without argument, time was taken by me to consider of the same.

The complainants, by their bill, seek for the discovery and production of the will of their father, Benjamin Bailey, alleged to be surreptitiously taken by William Stiles and Delia his wife,

* See ante, vol. 1, page 220.

two of the defendants, as in the said bill is set forth; or if the said will is lost, destroyed or suppressed, that the true contents thereof may be ascertained, proven or established under the order and decree of this court. That the complainants may hold and enjoy the several tracts of land and premises devised to them respectively by said will, as in the said bill is set forth, and their title thereto be finally established and confirmed to each of them, their heirs and assigns, according to the true intent and meaning of the said will. That the defendants may execute proper releases, and be perpetually injoined from setting up any claim, or from prosecuting any other action or actions, as heirs at law of the testator, for said or any part of said tracts; that the complainants' title may be quieted, and for further relief.

The defendants demurred to certain parts of the bill, and answered to other parts.

The application of the complainants, in pursuance of notice, is to restrain and injoin the above named defendants from further prosecuting two certain actions of ejectment, brought since the filing of the complainants' said bill, by the defendants above named, in the supreme court of this state, to the term of May last. One of said actions is brought against William Bailey, Miles Bailey, Henry Bailey and Charles Bailey, and the other against William Bailey, being four of the complainants in the above cause, to recover the possession of the same lands and premises, or some part thereof, mentioned in the bill of complaint filed in the above cause; and by an agreement indorsed on said notice, it appears that the said actions of ejectment in effect are prosecuted as mentioned in said notice. In each of the declarations in the said ejectments, there appears to be a count on the joint demise of Stiles and wife and Bockover and wife, and separate demises, one by Stiles and wife and the other by Bockover and wife. There is also an affidavit, made on the twenty-seventh of June last, as to the truth of the allegations in the complainants' bill.

The above named defendants, by their demurrer, say there is not any equity in the complainants' bill by which a decree can

be made against the said defendants, the validity of the said supposed will being matter of law and not of equity; which demurrer has been heretofore overruled. And Stiles and wife, by their demurrer to so much of the said bill as charged, among other things, that they surreptitiously and clandestinely took the said last will and testament and have either destroyed or concealed the same, say they were not bound to answer, and claimed the protection of the court, because the answer might criminate them; which demurrer was allowed, and they were protected from making their answer according to the order made for that purpose.

The said defendants, by their answer, say, that in or about the year eighteen hundred and twenty-nine, or some other time but when they cannot state with certainty, they heard that the said Benjamin had made a will, or that a will had been made for him the said Benjamin; but they deny that they ever said or admitted that the said Benjamin Bailey had made a will, or any writing purporting to be a will. And the said Bockover and wife, by their answer, say that they do not know whether the said Benjamin Bailey ever made a last will and testament or not, and if he did, they do not know where the same is, or what are the contents thereof, or whether the same was executed in such manner as to pass real estate; and they deny that they ever saw any last will and testament of the said Benjamin, and that they have any knowledge thereof other than what they have heard, and say they do not admit that the said Benjamin Bailey ever made any last will and testament sufficient to pass real estate, and they deny that the said Benjamin Bailey ever made any such will; and they insist that they, as heirs at law of the said Benjamin Bailey, with the other heirs of the said Benjamin, are entitled to the lands mentioned in the said bill.

The complainants' right to relief in this court having been considered in a former opinion upon overruling the defendants' demurrer, it will not be necessary to review that subject, but only to mention that the complainants, according to their case as stated in their bill, were entitled to relief.

It only remains to consider the extent and effect of the defendants' answers to the said bill. And, as to Bockover and wife, the strength of their answer consists in saying, that they deny that the said Benjamin Bailey ever made any such will, having previously said that they do not know whether the said Benjamin Bailey ever made a last will and testament or not. This denial, at best, is only a denial that the testator made a will, when they do not know whether he did or did not make a will. In the opinion of the master, this is not a satisfactory denial of the complainants' equity.

As to Stiles and wife, they protect themselves from answering on the ground that their answer may criminate them, which leaves the complainants' equity as to them unanswered.

Bockover and wife have united with Stiles and wife, not only in defending this suit, but have also united in the two actions of ejectment in question, and claim the lands alleged to be devised to the complainants upon joint as well as several demises; and, so far as concerns the present application, Bockover and wife must be subject to the same order as Stiles and wife.

I do therefore advise your excellency, that the complainants are entitled to an injunction, not on the priority of their suit in this court only, but on the merits of their case, (as appears from the pleadings,) to restrain the above named defendants from further prosecuting the said two actions of ejectment until the further order of this court to the contrary. In what stage these suits are, has not been stated, but there has been no suggestion that any judgment has been obtained.

This injunction is applied for on the ground of the prayer for an injunction contained in the complainants' bill, but on examining the same there does not appear to be any prayer for the process of injunction. In 5 *Con. Eng. Chan. R.* 117; 3 *Simons*, 273, *Wood* v. *Beadell*, an injunction was prayed for in the prayer of the bill, but was omitted in the prayer for process, and on that account an injunction was refused, but leave was given to amend. I would respectfully suggest to your excellency the propriety of requiring the complainants first to amend their bill,

by adding the prayer for process of injunction, and that such amendment might be annexed to the said bill as there are affidavits referring to said bill—the said complainants amending the defendants' office copy gratis when left with the clerk for that purpose.

Although, in my opinion, the bill ought to be so amended, yet as no exception was taken to the bill on account of that omission, I see no reason in this case why the chancellor should not take such course in respect to said amendment as shall be considered best for the practice of the court.

ELIAS VANARSDALE,
Master in Chancery.

JOSEPH C. WHITENACK v. JEREMIAH F. TEN EYCK et al.

Promissory notes given in satisfaction of a personal injury inflicted on the payee, though they exceed the probable amount of the injury inflicted, have a sufficient consideration to support them in law, and will not be set aside unless a compromise of the public offence was included as part of the consideration.

BILL filed March twentieth, 1833. The object of the bill is, to set aside certain promissory notes given by the complainant to Ten Eyck, one of the defendants, as being fraudulently and illegally obtained, without consideration, and against the policy of the law. The bill prayed an injunction also to restrain the said defendant from transferring the said notes, or from proceeding to recover them at law. An injunction issued pursuant to the prayer of the bill. Answers were filed by the defendants, and testimony taken by both parties. The chancellor having been concerned as counsel for one of the parties, the cause was referred to George K. Drake, esquire, one of the masters of the court, before whom the cause came on for final hearing upon the bill, answers, replication and proofs. The material facts disclosed

by the pleadings and evidence, appear in the opinion of the master.

Field, for complainant.

Hartwell, for defendants.

THE MASTER. On or about the eighth day of March, A. D. one thousand eight hundred and thirty-three, Joseph C. Whitenack, the complainant, made and delivered to Jeremiah Field Ten Eyck, one of the defendants, two promissory notes, one for the sum of two hundred dollars, payable on the first day of May then next, and one for the sum of four hundred and fifty dollars, payable on the first day of May, one thousand eight hundred and thirty-four, with interest from date. At the same time Ten Eyck signed and delivered to the complainant an instrument in the following words:—

"This is to certify that I have made a compromise with Joseph Whitenack for an injury which I received from him on the evening of Saturday last; and this is to show that I will not commence an action against him for said injury, nor require any compensation from him except the sum specified in a certain note which I hold against him; and further, I promise and agree to defend him against any suit in law commenced by any other person for the said injury which I have sustained. Witness my hand, this eighth day of March, one thousand eight hundred and thirty-three."

This paper was witnessed by William T. Davis and John Porter, the other defendants, and drawn by one James Taylor. The injury sustained by Ten Eyck was from a violent kick inflicted by Whitenack in a moment of intoxication, producing great bodily pain and some danger to life. The compromise was effected while Ten Eyck was yet confined to his bed, and before the whole consequences of the injury could be ascertained; but, from the evidence, the effects of the injury upon Ten Eyck's health and ability to labor, have not yet disappeared,

and there is considerable reason to believe that it will be lasting.

The complainant alleges, that if he inflicted the injury, it was slight; that the sickness was feigned: and that the occasion was artfully and fraudulently used by the defendants as the means of extorting money from him; and moreover, that the compromise not only embraced the personal injury to Ten Eyck, but also the public offence. And the bill prays that the said Ten Eyck may be restrained from assigning the said notes, or prosecuting any action on them; and that they may be declared to be void, as fraudulently obtained, without consideration, and against the policy of the law.

There is no material part of the complainant's case admitted by the answers. All charges of combination and fraud are distinctly denied. The injury appears from the answers and the evidence, to have been unprovoked, and very severe. The settlement for it before its extent could be ascertained, appears to have arisen from the impatience and anxiety of the complainant himself, having been brought about by his exertions for that purpose, rather than by those of the defendants. There is some reason to suspect, from the great anxiety of the complainant, from expressions that he used while effecting the compromise, from the sum paid, and other circumstances, that he supposed himself compromising and settling all his liabilities for the injury, whether public or private; and the instrument signed by him also gives countenance to this suspicion. But Ten Eyck, in his answer, says that the notes were given solely in consideration of the personal injury done to him by the complainant, and not for the settlement, compromise or prevention of a public prosecution. Porter and Davis, who witnessed the instrument, and Taylor, who drew it, all swear that they heard nothing said on the subject of a criminal prosecution.

Upon the whole case, I am of opinion that the complainant has failed to make out his allegations of combination and fraud in the obtaining of the notes; and that, being given as the settlement of a personal injury, which was considerable, although

its amount was uncertain at the time the compromise was made, and still remains so in some measure, the notes, even if they exceed the probable amount of injury, yet have a sufficient consideration to support them in law; and that the illegal consideration charged, to wit, the compromise of a public offence, is not sufficiently supported by proof to induce this court to set them aside on that ground; and that therefore the complainant is not entitled to the relief prayed by his bill.

GEORGE K. DRAKE, Master in Chancery.

Decree accordingly.

In the matter of the alleged Lunacy of ABRAHAM WHITENACK.

Reasonable notice of the time and place of taking of an inquisition of lunacy, should be given to the alleged lunatic; and the want or defect of notice is not aided by his appearing before the jury and attempting a defence.

An inquisition of lunacy taken without due notice, will be set aside, and a new commission awarded.

PETITION, by an alleged lunatic, to set aside the inquisition of lunacy, for want of due notice of the time and place of taking the same. The chancellor having been of counsel for one of the parties, the motion was heard before George K. Drake, esquire, one of the masters of the court.

G. A. Vroom, for petitioner.

Hartwell, contra.

THE MASTER. Upon the petition of Urias Stryker, of the county of Somerset, a commission was issued from this court, to inquire whether Abraham Whitenack, of the township of Hillsborough, in said county of Somerset, is a lunatic, &c.; which commission was executed, and an inquisition taken on the thir-

tieth day of May, A. D. one thousand eight hundred and thirty-four; whereby it was found that the said Abraham Whitenack was then, and had been for thirty months before and upwards, a lunatic enjoying lucid intervals, and that he was not capable of the government of himself, his goods and chattels, lands and tenements.

On the tenth day of June following, the said Abraham Whitenack filed his petition, stating among other things, that no notice of the taking of the inquisition had been served on him; that about thirty hours before the taking of the inquisition, he heard for the first time, by one of his neighbors, that some proceedings were to be had at Hogtown about his person and property, but what it was he did not, nor could he understand; that he sent his son to obtain information and employ counsel; that on the morning of the day on which the inquisition was taken, his son came and informed him that a jury was to be called for the purpose of inquiring whether he was a lunatic. He adds, that he appeared in person and by his counsel before the commissioners and jurors, but that he had no opportunity of making that defence and explanation which the importance of the case demanded. And he therefore prayed that the said commission may be suspended, or that he might have leave to traverse the said inquisition. Whereupon all further proceedings on the commission were suspended.

In the case of *Tracy*, 1 *Paige*, 580, it was decided to be the privilege of a party against whom a commission of lunacy is issued, to be present at and to have notice of its execution. And this case is cited with approbation by chancellor Vroom, in the case of *Daniel Applegate;* and the necessity of giving notice to a lunatic or his friends, as a general rule, is established, and there having been no notice in that case, the rule confirming the inquisition was set aside, and a new commission directed.

The present case is one in which notice should have been given to the lunatic himself. He was a man of large estate, real and personal, and who, up to the time of the taking of the

inquisition, was in the habit of making contracts and managing his property.

If notice should be given, it should be a reasonable notice. That which was obtained indirectly in this case, was in effect no notice. Nor does it much vary the case, in my mind, that the lunatic appeared in person and by counsel, and, as is proved by affidavits taken on the part of the petitioner, was examined himself, and had some witnesses examined by the commissioners and jury.

In ordinary cases, an appearance cures a defective service of notice. And it is a very proper rule, where the appearance precedes for a considerable length of time the trial or investigation, or where the investigation is preliminary, or of but minor importance. But it appears to me that it should have little or no effect in this case, where a man, lunatic, or of doubtful capacity, is called upon suddenly to act upon a matter involving the control of his person and property. If, under such circumstances, he should attempt a defence, it is not such an acquiescence in the proceeding as should bind him, and he should have an opportunity for re-investigation.

The only question in my mind is the manner in which this should be done. Whitenack asks that the commission should be superseded, or that he may be permitted to traverse it. Whether a traverse is to be considered in New-Jersey a matter of right or not, I think it should not be denied in such a case as this. And it also appears to me, that, although there was an appearance, and a defence, necessarily imperfect under the circumstances, was attempted before the commissioners and jury, yet it is within the discretion of this court to take the same course pursued in the case of *Applegate;* and I am therefore of opinion that the inquisition should be set aside, and that a new commission should issue, and that due notice should be given to Abraham Whitenaek, the alleged lunatic, of the time and place of executing it; and that the question of costs be reserved.

GEORGE K. DRAKE, Master in Chancery.

Order accordingly.

MOSES QUICK v. JOHN LILLY and others.

To entitle a party to file a bill in the nature of a bill of review, upon the ground of newly discovered matter, the evidence discovered must not only be new, but material, and such as if unanswered in point of fact, would either clearly entitle the party to a decree, or would raise a case of so much nicety and difficulty as to be a fit subject of judgment in a cause.

The court will not, before granting leave to file a bill of review, inquire whether the petitioner can prove the facts set out in his petition. If the facts and matters set forth in his petition, verified by his own oath, are such as to lay a sufficient foundation for a bill of review, it is all that is required.

The party will be required to file his bill of review within a limited time, and to deposit with the clerk of the court at the time of filing the bill, one hundred dollars, as security for costs.

PETITION by a defendant, after decree and order for re-hearing, for leave to file a bill in the nature of a bill of review, upon the ground of newly discovered matter. The circumstances of the case are stated in the opinion of the chancellor.

Clark and *Williamson*, for petitioner.

Saxton, contra.

Cases cited for petitioner. *Cooper's Pl.* 92, 216; *Mitford's Pl.* 80; *Hind's Prac.* 57; 1 *Mad. Chan.* 536, (2d ed.)

Saxton, contra. The defendant has already obtained an order for re-hearing, upon the ground of the discovery of this evidence, under which he may have all the benefit he can have in a bill of review. Under this rule the evidence relied on has been taken and filed. Is the evidence to be taken over again? 2 *Y. and J.* 381; 1 *Vesey and B.* 153; 6 *John. C. R.* 255.

The petitioner does not ask to file a supplemental bill, and if he did it could not be done, because there is no supplemental matter. All existed before the former decree. No transaction between the parties, or change of interest, has occurred since

to require a supplemental bill; and the party cannot, by filing the bill, place the defence on different grounds: 16 *Vesey*, 348; 2 *Ball and B.* 457; 17 *Vesey*, 144.

The alleged newly discovered evidence might with due diligence have been sooner discovered: 1 *Jac.* 243; 2 *Ball and B.* 461.

The newly discovered evidence does not go to establish any new fact, or to strengthen the defendant's case. It is therefore immaterial: 17 *Vesey*, 144; 2 *Maddock's Rep.* 53; 2 *Atkyns*, 529.

To entitle the petitioner to file the bill, the newly discovered evidence ought to be such as materially to affect the grounds of defence, and to entitle the defendant to a different decree. The newly discovered evidence in no wise affects the grounds of defence relied on by the defendant in his answer, and in his petition for re-hearing: 6 *Maddock's R.* 127; 3 *John. Chan. R.* 124.

Merely cumulative evidence is no ground for a new trial at law; so in equity, additional evidence on a matter admitted or not denied, or on which some evidence has already been given, is not a ground for a re-hearing: 1 *Hen. and Mun.* 480; 2 *Ridgeway's P. C.* 504.

The Chancellor. The bill was filed to foreclose a mortgage alleged to be lost or mislaid, and which was still outstanding and unsatisfied. The defence was, that the mortgage had been given up to be cancelled, and part of it being paid, a new mortgage was given afterwards for the balance. There was evidence of the giving a new mortgage, on different property, for the balance of the original mortgage, but no satisfactory evidence, if indeed there was any, to prove that the mortgage had been given up and the new one given and received in lieu of it. On the contrary there was evidence to show the admission of the mortgagor, long after the second mortgage was given, that the first one was still subsisting and unsatisfied. This was attempted to be explained away; but the defendant failed to satisfy the

court that the first mortgage (being the one in question) had been delivered up to the mortgagor as satisfied.

Afterwards, the defendant alleging that the lost mortgage had been found with the seals torn off, and under circumstances which went to show that it had really been satisfied, applied for a re-hearing, and for leave to present new evidence. The court agreed to grant a re-hearing, and that the defendant might have the benefit of the documentary proof; but intimated that no other new evidence could be permitted.

The defendant declined taking an order for a re-hearing upon these terms, and now applies by petition for leave to file a bill in the nature of a bill of review, in which he may have the benefit of the newly discovered evidence, and show not only the mortgage with the seals torn off, but when and by whom the same was found, and under what circumstances.

The question now is, whether the petition shall be granted. The rule in cases of this kind is, that the evidence discovered must not only be new, but material; and the meaning given to the word *material* is of the highest importance. The new matter must be such as if unanswered in point of fact, would either clearly entitle the plaintiff to a decree, or would raise a case of so much nicety and difficulty, as to be a fit subject of judgment in a cause: *Norris* v. *Le Neve*, 3 *Atk.* 26; *Ord* v. *Noel*, 6 *Mad.* 131; 1 *Hoff. Ch. Prac.* 570.

In this case the complainant insists that the mortgage is outstanding, though lost. The defendant contends, on the other hand, that it was delivered up as a satisfied mortgage to the mortgagor. That is the point in dispute. The fact of the instrument being found with the seals torn off, is of some importance; but its materiality to affect the decree, must depend very much on the collateral proof that may be made in regard to it; such as, by whom and under what circumstances it was found, where it was discovered, and how it probably got there.

The proof upon those matters, as now exhibited, consists principally of hearsay testimony, and is not satisfactory. If I am to consider this as all the evidence within the power of the party,

I should say that leave ought not to be granted to file the bill of review. But this is not the time to inquire whether the petitioner can prove all the facts set out in his petition. He there states the facts and matters which he expects and believes he will be able to prove, and verifies the petition by his own oath. If they are such as to lay a sufficient foundation for a bill of review, it is all that is required. The merits of the case cannot be tried on the petition. In this case the petitioner has laid such foundation. He charges, that the mortgage was cancelled by the mortgagee himself, and that he hopes he will be able to prove it, as well by the production of the cancelled mortgage as by other evidence; and that this was done fairly and legally, and long before the filing of the bill.

I am disposed to allow the prayer of this petition, though with reluctance, on account of the delay which has taken place. I do not mean to say that if all the new matter on which the petitioner relies shall be proved, it will clearly entitle him to a decree; for it must be recollected that the complainant is in possession of the written acknowledgment of the mortgagor, that the mortgage is still outstanding and unpaid. But it may present a case of some difficulty; so much so, "as to be a fit subject of judgment in a cause."

Let the bill be filed within thirty days, and the petitioner deposit in the office at the time of filing, one hundred dollars, as security for costs, according to the practice of the court: *Hind's Prac.* 57, 58; 2 *P. W.* 283: *Lord Bacon's Ordinances*, 1; *Ld. Hardwicke's Order*, 2 *Atk.* 139; *Webb* v. *Pell*, 1 *Paige*, 564; *Pendleton* v. *Fay*, 3 *Paige*, 204.

Petition granted.

WILLIAM EDGAR v. SAMUEL CLEVENGER et al.

A general creditor having filed his bill for relief, and having subsequently obtained judgment and execution at law, is not entitled to relief upon his original bill, though a decree *pro confesso* be taken against the defendant. A

[Edgar v. Clevenger et al.]

supplemental bill should be filed, stating the facts which entitle him to relief.

If a bill be so entirely defective that no decree can be made upon it, it will not be aided by a supplemental bill founded on facts that have subsequently taken place.

But if the bill be sustainable on any ground, even for the purpose of granting temporary relief, the court having possession of the cause may hold it for the more general and important purposes of the bill, and will permit the complainant to file a supplemental bill.*

F. B. Chetwood, for complainant.

THE CHANCELLOR. The principal object of the bill in this case is to impeach and set aside, on the ground of fraud, a judgment confessed by Samuel Clevenger to Israel Wilkinson, for four hundred and seventy-four dollars and eighty-six cents, and entered up in the inferior court of common pleas of the county of Middlesex, at the term of September, eighteen hundred and thirty-four. As auxiliary to this relief, the complainant, who was a creditor of Clevenger, prayed an injunction to restrain the sheriff from selling under the execution in his hands, and also to restrain the defendant, Clevenger, from disposing of the property at private sale. The injunction was refused, upon the ground that Edgar, being only a general creditor, and having no specific lien on the property, had no right to interfere with any disposition his debtor might think fit to make of it. It appeared by the bill that the complainant had commenced a suit against Clevenger, which he was prosecuting to judgment as fast as the forms of the law would permit;—but the court was of opinion that the commencement of the suit was not sufficient; and that nothing short of a judgment and execution would authorise the complainant to ask for the aid of a court of equity: *Angell* v. *Draper*, 1 *Vern.* 399; *Shirley* v. *Watts*, 3 *Atk.* 200; *Balch* v. *Wastall*, 1 *P. Wms.* 445; *Mitf.* 115; *Coop. Eq. Pl.* 149. Since that time the complainant has obtained a judgment at law and sued out an execution; and there being no ap-

* See this case on final hearing, reported ante, vol. i. page 258.

pearance to the bill filed in this court, he obtained in the term of January a decree pro confesso, and an order to take testimony in support of the allegations of his bill. Having examined witnesses and produced an exemplified copy of the judgment and execution, he seeks a decree setting aside and annulling the judgment of Wilkinson, on the ground of fraud and collusion.

It appears to me that these proceedings are irregular, and that the complainant is not now in a situation to ask for such decree. His bill not only exhibited no ground for an injunction, but no ground for relief, so far as it sought to impeach the judgment of Wilkinson. There was no equity in it. That the party has now an equity by his judgment and execution subsequently obtained, is of no avail. They cannot relate back to the time of the commencement of this suit; and a decree, such as the complainant asks, founded upon the bill as filed, would be erroneous. It would exhibit the court as giving relief against long established principles.

The proper course for the party to pursue, after obtaining his judgment and execution, was to file a supplemental bill, stating the facts. He would then have had a proper case for relief. It would have appeared on the record, and not merely in the evidence. The case of *Candler* v. *Pettit*, 1 *Paige*, 168, is directly in point.

The only question, as it appears to me, is, whether the bill is at all sustainable; for if it be entirely defective, so that no valid decree can be made upon it, it will not be aided by a supplemental bill, founded on facts that have subsequently taken place. In this case, part of the complainant's debt, which he hoped the better to protect and secure by impeaching the judgment of Wilkinson, and staying the sale of the property as well real as personal, was a debt secured by mortgage on the lands levied on by Wilkinson's execution; and the bill charging that fact, and that the defendant was wasting the property by cutting timber, &c. an injunction was granted so far as to stay waste. I think the bill was sustainable on that ground;—and the court, having possession of the cause for such temporary relief, may hold it for the

more general and important purposes of the bill. The complainant will therefore be at liberty to file a supplemental bill, if he shall think proper so to do.

Order accordingly.

WALTER KING v. JOHN W. BERRY and BRANT VAN BLARCOM, Executors of WILLIAM BERRY, deceased.

The balance of assets remaining in the hands of executors after payment of debts, should either be paid to those interested, or be put out at interest for their benefit.

If the funds are used by the executor, he is required not only to pay interest, but to account for all the profits he may have made.

If no profit has been made, but the money has been suffered to lie idle, he will be charged with simple interest for his negligence.

The executor will not be exempted from the payment of interest, simply on the ground that the legatees were at a distance, and might call for their money when it was not in hand.

In cases of manifest error it will not excuse an executor, that he acted on the advice of counsel; but in doubtful cases, it is a circumstance entitled to great weight in his favor.

Where the exact line of duty was not clear, where the executor has acted in good faith, and under the advice of experienced counsel, and has not attempted to make any profit to himself, interest ought not to be charged against him.

It is the privilege of executors and trustees to take counsel when any difficulty occurs as to their duty, and counsel fees will be allowed out of the estate.

Travelling expenses incurred by an executor are not a lawful charge against an estate. Expenses of that kind must be taken out of the commissions.

THE complainant filed his bill for the recovery of certain legacies, bequeathed by the last will and testament of William Berry, deceased, and for an account. An interlocutory decree in favor of the complainant, was made at April term, A. D. eighteen hundred and thirty-four, directing a reference to a master to take and state an account upon proper and equitable princi-

ples.* Upon the coming in of the master's report, exceptions were filed by John W. Berry, one of the executors; and the cause came on to be heard at April term, A. D. eighteen hundred and thirty-five, upon the exceptions to the report.

Dickerson and *Vanarsdale*, for exceptant.

E. B. D. Ogden, for complainant, contra.

THE CHANCELLOR. The accounts have been taken by a master, under an order of the court, made on the eighth day of July, eighteen hundred and thirty-four; and the exceptions are taken by John W. Berry, one of the executors and accountants.

1. The first exception is that the master has charged him interest upon monies of the estate in his hands, when he had the same ready to be paid over to those who were entitled, and when by law he was not bound to pay interest.

William Berry, the testator, died in January, eighteen hundred and twenty-six, possessed of a considerable personal and real estate, and leaving a last will and testament, of which he appointed the defendants executors. The principal part of the property was bequeathed to persons in England, who were unknown to the executors, and by whom no immediate claim was made for the property. The balance in the hands of John W. Berry is stated by the master to be four thousand three hundred and twenty dollars and seventy-two cents; all of which, with the exception of about one hundred dollars, was received before the first of July, eighteen hundred and thirty. From January, eighteen hundred and twenty-six, to first of May, eighteen hundred and twenty-seven, Berry received of the estate eighteen hundred and sixty-nine dollars and nineteen cents, and paid out for debts, &c. one hundred and eighty-one dollars and ninety-one cents—leaving a balance of sixteen hundred and eighty-seven dollars and twenty-eight cents. Nearly all this balance was in hand a year before any interest is charged, On the first of May,

* See ante, page 55.

eighteen hundred and twenty-seven, the debts being paid, a balance is struck, and on that interest is computed to the time of taking the account.

The residue was received in different sums, as follows:—

1828.	May	1,	35 00
1829.	"	"	35 00
1830.	"	"	35 00
"	"	8,	859 25
"	June	7.	657 76
1831.	May	1.	35 00
1832.	"	"	35 00
1833.	"	"	35 00
"	"	"	9 85
			$1736 86

On these sums, respectively, interest has been computed after six months, except the three last, on which interest has been cast from the time they were received—amounting in the whole to three hundred and seventy-six dollars and sixty-three cents.

The executor contends that he ought not to be charged with interest until the year eighteen hundred and thirty-one. That up to that time the money was kept in hand to answer the purposes of the estate, and according to the directions of the testator, and the advice of his counsel. That finding, in the year eighteen hundred and thirty-one, that a claim was made to the money by the present complainant, as assignee of the legatees in England, and supposing that some years would elapse before the suit could be determined, he made use of the balance for his own purposes, in his own business; and from that time he is willing to account for the lawful interest, but ought not to be charged for any longer period.

As a general rule, it is the duty of executors and trustees not to suffer money of others to be idle in their hands. The balance of assets remaining, after the payment of debts, should either be paid to those interested, or be put out at interest for their benefit. If the funds are used by the executor, and mingled with his own, he is required not only to pay interest, but to account for

all the profits he may have made. No rule of equity is better settled at this day, than that a trustee shall not be permitted to make a profit out of the estate of his cestui que trust. If no profit has been made, but the money has been suffered to lie idle, he will be charged with simple interest for his negligence.

In this case, it is sufficiently proved that the money was in hand, and not used. The complainant has searched the conscience of the executor. His answers as to that fact are positive and direct, and there is nothing in the evidence sufficient to disprove them. He is to be charged, then, with simple interest on general principles, unless there is something special in this case to excuse him. Several matters have been urged. It is said, first, that the legatees were in England, and it being uncertain when they would call for their money, it was the duty of the executor to keep it by him, that he might pay it to them without delay, whenever it should be demanded. This is not of itself a justification. A considerable part of the money was out on interest, and for aught that appears, safely invested; and the residue might have been invested without risk. It is not likely that legatees, situated as these were, would have incurred the expense of coming to this country or sending an agent for the money, without apprising the executors, and ascertaining from them when they would be prepared to pay it; and even if they should have done so, it is going almost too far to suppose that they would have been obliged to pay the money forthwith, without a reasonable opportunity of collecting it. The case does not show that they had any special reason for expecting them very shortly after the testator's death; and it does not appear that any pains were taken to give them information of the death of the testator, or the amount of the estate. I think that, under these circumstances, it is asking too much of the court, to exempt the executor from the payment of interest, simply on the ground that the legatees were at a distance, and might call for their money when it was not in hand. I am afraid to set such a precedent—one which will cover all amounts, and is a strong temptation to concealment and speculation and frauds on the part of executors and trustees.

But the executor contends, in the next place, that the testator in his life-time directed him to collect in the money outstanding, and to keep it by him, and have it ready when the legatees should come for it; and that he was advised by his counsel to keep the money in hand. There is no direction of that kind in the will, and there is no evidence of it except the declarations of the executors. They have been examined on oath by the complainant touching the matter, and they both state that such direction was given. These declarations are entitled to be considered, but they are to be looked at with jealousy. To rest upon them alone would be hazardous, if not unsafe to the interests of legatees.

The executor insists, however, that he has acted in good faith, and under the advice of counsel, and therefore he ought not to be made to pay this interest out of his own pocket. To my mind, there is no reason to doubt the honesty and good intention of the executor. The money was kept in hand, but for no benefit to himself. He believed he was acting in accordance with his duty, and kept the amount in his desk. He thought he was right in following the verbal directions of the testator as he understood them; and that he acted according to the advice of counsel is made very plainly to appear.

It is the privilege of executors and trustees to take counsel when any difficulty occurs as to their duty. It is a safety at all times. It will not excuse them in cases of manifest error; but in doubtful cases, it is a circumstance entitled to great weight in favor of the executor, that he acted on the advice of counsel. Seeing that in the execution of this trust it may not always be easy to perceive the exact line of duty, and that the executor has acted in good faith and under the advice of experienced counsel, and has not attempted to make any profit to himself, I am inclined, under the special circumstances, to say that interest ought not to be charged against him until the year eighteen hundred and thirty-one. The first exception is therefore allowed.

2d Exception. That the master has not allowed for expenses necessarily incurred in the settlement of the estate.

[King v. Ex'rs of Berry.]

The amount in question is fifteen dollars and fifty cents. One item, amounting to five dollars and fifty cents, is for expenses in going at different times to Newark. The other is ten dollars for a counsel fee. The first is not a lawful charge. Expenses of that kind must be taken out of the commissions. The last item is a proper charge, and should be allowed.

3d Exception. That the commissions are insufficient.

The commissions allowed are moderate; but as the case now stands, I am not disposed to interfere with this part of the report, and accordingly overrule the exception.

This is not a case for costs against the executors.

The President, Directors and Company of the STATE BANK AT NEW-BRUNSWICK v. The Receivers of the BANK OF NEW-BRUNSWICK.

A claim which cannot be allowed as a set-off under the act to enable mutual dealers to discount, may nevertheless be allowed as a set-off by receivers, under the act to prevent frauds by incorporated companies.

The act entitled "An act to prevent frauds by incorporated companies," partakes largely of the character of a bankrupt law. The general object of the act and the provisions made to effect it are essentially the same as the bankrupt law; and it seems proper to apply to it the general rules that govern the bankrupt system where it is in use.

The act does not confine itself to *legal* set-offs, but refers to *just* set-offs, and expressly directs the receivers to allow them when they ought to be allowed according to *equity*. It gives to receivers an equitable power, and they are to exercise it according to the justice of the case.

Where the creditor has two funds, one separate and one in common with others, he must first look to his separate security, and after that is exhausted he may look to the fund in which others are interested.

The property in the hands of receivers is considered as in court and under its control, to be administered so as best to subserve the purposes of equity.

As soon as the assets are withdrawn from the debtor and placed in the hands of receivers, the general creditors acquire rights, which the court will protect by placing all the creditors on an equality as far as possible.

THIS case came before the court upon an appeal taken by the State Bank at New-Brunswick, from a decision made by the

receivers of the Bank of New-Brunswick, appointed under the act entitled "An act to prevent frauds by incorporated companies," passed the sixteenth of February, eighteen hundred and twenty-nine, (*Elmer's Digest*, 32.) The facts of the case, and the grounds of the appeal, are stated in the opinion of the chancellor.

J. W. Scott, for the petitioners.

E. Wood, for the receivers.

THE CHANCELLOR. The facts of the case are briefly these. On the first day of February, eighteen hundred and thirty-four, and before the Bank of New-Brunswick stopped payment, the State Bank had in possession nine hundred dollars in bills of the Bank of New-Brunswick, which had been regularly received in the course of business; and the further sum of four thousand two hundred and thirty-eight dollars, which had been remitted to the State Bank from the Trenton Banking Company for the purpose of collection, either one or two days before. These two sums, amounting in the whole to five thousand one hundred and thirty-eight dollars, the State Bank presented at the counter of the Bank of New-Brunswick, on the said first day of February, and demanded payment. On the sixth of February, the Bank of New-Brunswick not having redeemed said bills, placed in the hands of the State Bank, R. F. Stockton's note, endorsed by J. R. Thompson and F. Richmond, cashier, for six thousand dollars, as collateral security for the payment of the said sum of five thousand one hundred and thirty-eight dollars, and took a receipt specifically stating the amount and object.

On the twelfth day of February, the Bank of New-Brunswick, by their cashier, delivered over and endorsed to the State Bank, R. F. Stockton's draft, as president of the Delaware and Raritan Canal Company, on James Neilson, treasurer, and accepted by him, for one thousand dollars, dated January seventeenth, eighteen hundred and thirty-four, and payable at ninety days; which

was to be held as a collateral security for any bills of the Bank of New-Brunswick at that time unredeemed, or which might thereafter be unredeemed at the counter of the State Bank.

Shortly afterwards, the six thousand dollar note of Stockton and Thompson was, in consequence of some arrangement between the Bank of New-Brunswick and the Trenton Banking Company, delivered up to the said Trenton Banking Company by the State Bank, for the sole use and benefit of the said Trenton Banking Company; and in lieu of their interest in it, the State Bank received of the Bank of New-Brunswick a draft of R. F. Stockton, president, and John R. Thompson, secretary, for one thousand dollars, drawn on James Neilson, and accepted, and endorsed by E. Baldwin and F. Richmond, cashier, as a collateral security for the said nine hundred dollars in notes of the Bank of New-Brunswick; and gave a receipt for it, dated the fourteenth of February, eighteen hundred and thirty-four.

On or about the eighteenth of February, the Bank of New-Brunswick stopped payment. Prior to that day, the State Bank had received at their counter in the regular and ordinary course of business, three thousand and ninety-seven dollars in bills, for which they have no other security than the bills themselves, and the proceeds of the two drafts of one thousand dollars each. Those drafts fell due on the nineteenth of April, and were paid at maturity.

On the seventeenth of May, eighteen hundred and thirty-four, the State Bank presented the bills of the Bank of New-Brunswick to the receivers, that is to say, three thousand and ninety-seven dollars, and claimed a right to a dividend on that amount and a certificate therefor. The receivers refused to admit the claim. It appears from a minute of their decision, that they considered the one draft of one thousand dollars as a collateral security for the specific sum of nine hundred dollars in possession of the State Bank at the time the draft was assigned; and that the other was a collateral security for the redemption of bills unredeemed when the draft was received, or that might be thereafter unredeemed. They considered, also, that the one hundred

dollars of the first draft received by the State Bank, over and above paying the nine hundred dollars for which the draft was specifically pledged, ought not to be admitted by them as a proper offset, but that the same belongs to them as so much money had and received for their use, to be collected and held by them for the benefit of the creditors and stockholders of the Bank of New-Brunswick. The State Bank, nevertheless, insisted on their right to retain the one hundred dollars, with the remaining draft, as collateral security, to indemnify them against any loss they might eventually sustain on the bills of the bank held by them.

The receivers then offered to offset against the said bills the sum of nineteen hundred dollars received by the State Bank on the said drafts, and to allow the said State Bank a claim for the residue after deducting the said sum of nineteen hundred dollars. The State Bank declined the offer thus made, and insisted on having their claim admitted for the whole amount of the bills on hand, and retaining the monies received on the drafts to indemnify them against such loss as might eventually be sustained on the said bills. This being refused by the receivers, the State Bank has appealed to this court, according to the provisions of the eighteenth section of the act entitled "An act to prevent frauds by incorporated companies," passed February sixteenth, eighteen hundred and twenty-nine.

1. As to the nine hundred dollars of bills on hand at the time the first draft for one thousand dollars was given; the petitioners cannot make claim for that debt, or prove it before the receivers. The draft was given as security for a specific sum, being less than the amount of the draft. The object was special and limited, and the State Bank, on receiving the money for the draft, could appropriate it only to the purpose for which it was pledged. The contracts in relation to the two drafts were distinct as to time and object. The drafts had separate ends to answer, and there is neither justice nor propriety in blending them. This, in fact, has been admitted by the written argument with which I have been favored, and it is unnecessary to consider it further. As to

this part of the case, the State Bank has yielded to the views of the receivers, admitting them to be right.

2. After appropriating nine hundred dollars of the first draft to the payment of that amount of bills, for which it was specifically pledged, there remains one hundred dollars of it to be disposed of. The receivers contend that this belongs to the general fund for the benefit of all the creditors, as part of the assets of the Bank at the time of the suspension of payment. The petitioners claim the right to offset against it the like amount in bills of the Bank of New-Brunswick on hand at the time of the failure.

I think that under the provisions of our statute, to enable mutual dealers to discount, this claim could scarcely be allowed. The statute has reference to mutual debts between the parties; whereas the cases cited by the counsel for the petitioners are cases governed by the bankrupt laws of England, by which laws the right of set-off is enlarged so as to extend to mutual credits. Such are the cases *Exparte Deeze*, 1 *Atkyns*, 228; *Exparte Charles Prescot*, 1 *Atkyns*, 230; *Atkinson and al.* v. *Elliot*, 7 *T. R.* 378; *Cooke's Bankrupt Laws*, 567.

I incline to the opinion, nevertheless, that this set-off should be allowed; and for two reasons. 1. The act under which these proceedings are had, partakes largely of the character of a bankrupt law. As was well remarked by the receivers in their argument, "the general object of the act, and the provisions made to effect it, are essentially the same as the bankrupt laws." Under the bankrupt system, the claim would be admissible; and if this act is to be considered as partaking of the character of a bankrupt law, it is proper to apply to it the general rules that govern the system where it is in use.

Another reason is, that the words of the act under which these proceedings are had, in relation to this species of set-off, are peculiar and liberal. "In case of mutual dealings between the said corporation and any other person or persons, the receivers are to allow just set-offs in favor of such person or persons, in all cases in which it shall appear to them that the same ought to be allowed according to law and equity:" *Har. Com.* 212. The general act

before adverted to, (*Rev. Laws*, 307,) refers only to *mutual debts*, and it is plain that *legal* set-offs must be confined to cases of that description. The act upon which the court is now called to adjudicate, does not confine itself to legal set-offs. It refers to *just* set-offs; and expressly directs the receivers to allow them when they ought to be allowed according to *law* not only, but *equity* also. It would seem from the phraseology of the statute, that the legislature had something more in view than the general provisions of the law in regard to set-offs. It gives to the receivers an equitable power, and they are to exercise it according to the justice of the case; and it appears to me that in the present instance the allowance will be just and equitable.

3. It remains to inquire whether the petitioners are entitled to prove their debt for the whole amount, after deducting the nine hundred dollars and the offset of one hundred dollars, and obtain a dividend on the whole, reserving the second draft of one thousand dollars to make up the deficiency; or whether they shall appropriate the draft to the payment of so much of the debt first, and prove for the balance.

On this part of the case I think the decision of the receivers was right, and that the petitioners can be admitted to prove for the balance only. This would be the course under the bankrupt laws. The general principle running through the whole system, is, that equality is equity. All the property, so far as it can be reached and collected, is brought into one common fund, for the benefit of all the creditors; and when a creditor has a security, and insists upon proving, he must deliver up the security for the benefit of the creditors at large: *Exparte Grove*, 1 *Atk.* 104; *Exparte Twogood*, 19 *Ves.* 229. In this last case, the court observed, that if the subject of deposit is the bankrupt's property, it must be sold, and the excess proved as a debt. See also *Cooke's Bank. Law*, 124, 155. The same principle has been applied to cases of insolvency, where the funds are under the control of a court of equity for the benefit of all the creditors. In *Greenwood v. Taylor, Rus. and Mylne*, 185, (4 *Cond. Ch. Rep.* 381,) a mortgagee petitioned for the sale of his security, and to be permit-

ted to prove the full amount of his debt in a suit for the administration of the assets of the deceased mortgagor. It was contended in that case for the petition, as it was in this, that the mortgagee has a right to avail himself, concurrently, of all the remedies which belong to him either in respect of his specific lien on the estate, or as a general creditor of the mortgagor, by virtue of the covenant for the payment of the mortgage money:—that there was nothing to prevent him from proving the whole amount of his demand, in the same manner as he might have sued the testator if alive, and taken out execution against him for the whole amount. It was contended, also, that the rule in bankruptcy cases depended on principles peculiar to that system of equity jurisdiction, and never could be extended beyond it. But the master of the rolls, in delivering his opinion, said, "The rule in bankruptcy must be applied here, and the mortgagee cannot be permitted to prove for the full amount of his debt, but only for so much as the mortgaged estate will not extend to pay. This rule is not founded on the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the administration of assets. The mortgagee who has two funds, as against the other specialty creditors who have but one fund, must resort first to the mortgage security, and can claim against the common fund only what the mortgaged estate is deficient to pay."

If this principle be correctly applied to the administration of insolvent estates in equity, there is an end of the question. The security must first be applied to the payment of the claim, and then the common fund must be resorted to for the balance. The justice of the rule has been so strongly felt, that it has been recognized and adopted even in a court of law; as in the case of *Amory* v. *Francis*, 16 *Mass. Rep.* 308. There a creditor of an insolvent estate had a mortgage as security for his debt, of less value than the amount of the debt, and it was held that he could claim from the commissioners only for the difference between his debt and the value of the property mortgaged. The chief-justice says, the rule was adopted in England on account of its reasona-

bleness, and because consistent with the nature of the contract. For the property pledged is in fact security for no more of the debt than its value will amount to, and for all the rest the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole, if no security were taken. The same rule would undoubtedly be applied in England to cases of insolvent estates, where the debtor has deceased, if any mode of settlement and distribution of such insolvent estates existed there.

The argument of the counsel for the petitioners appears to be founded, as to this point, on the idea, that the insolvency of the bank can have no effect upon his rights or remedies—that they have the same remedies against the receivers which they once had against the bank. But can this be so? Does not this very proceeding show that his strict legal remedies have been interfered with by statute, and that the whole assets of the corporation, his debtor, have been placed in the hands of receivers, to be administered for the benefit of all his creditors, under the direction of this court? Suppose the petitioners, instead of coming in to prove their debt under the statute, had proceeded by suit at law against the corporation, as though it were still solvent, and as though no receivers had ever been appointed, and had obtained a judgment and execution;—of what avail would they have been? Surely none. And yet they would have been available against the corporation if no act of insolvency had been committed. The statute has come in and interposed for the benefit of the whole; and it is right that it should be so. Hence it is plain that the receivers do not stand in the same situation as the bank did, nor is the property in their hands subject to the same legal remedies as it was when in the possession of the bank. It is now considered as in court, and under its control—to be administered so as best to subserve the purposes of equity. This court cannot take away, or cancel, or discharge, a just debt, as between these parties; but it can regulate the mode of securing and obtaining it. It can say to a party who has two funds, one separate and the other in common with others, you must first look for

payment of your debt to the fund you hold alone, and which other creditors cannot touch; and then, if you are not satisfied, you can resort to the fund in which others have an interest as well as yourself. The debtor, while the property is in his own hands, cannot say this, because he has no right or power to deprive his creditor of any of his legal remedies; and the same may be said of the general creditors. But as soon as the assets are withdrawn from the debtor, and placed in the hands of receivers for the benefit of all, the general creditors acquire rights which the court will protect, by placing all upon a footing of equality as far as possible. This is every day's practice.

It is said, and truly said, that there is a great difference between the two drafts; the one being left as collateral security for a sum certain, and the other for an undefined amount, or for any bills of the Bank of New-Brunswick that were then unredeemed, or that might thereafter be unredeemed. But I am not satisfied with the conclusion drawn by the petitioners, that the first being security for a definite sum, shall, when paid, be considered as satisfying and paying at once the whole of that sum, and yet that the second, when paid, shall be held as paying and satisfying no part of the amount for which it was security, until it be ascertained whether the bank can pay first. Both drafts were delivered as pledges, or collateral security. If, according to the doctrine of the petitioners, the collateral security, *ex vi termini*, cannot be called on to pay until it is ascertained whether the principal can pay, why not ascertain whether the principal can pay the nine hundred dollars, the specific sum for which the first draft was pledged? Why pay that with the pledge, without first calling on the bank to respond? If in the one case the payment of the draft is considered as payment of the original debt, why is it not to be considered in the other case as payment, so far as it will extend? Is it right to apply a different rule to the two cases, because in the one the pledge will more than pay the debt, and in the other will fall short? I do not perceive the justice of the distinction.

In the original claim of the petitioners as made to the receiv-

ers, they did not consider the first draft as paying off the specific sum of nine hundred dollars for which it was pledged, but insisted on their right to prove for the whole, and receive their dividend for the whole out of the general fund, and then resort to the two drafts for any deficiency. They placed both drafts upon the same footing, as strictly collateral. This ground was abandoned by the counsel as to the first draft, and I think it cannot be supported as to the other.

It appears to me that the State Bank has fallen into an error as to the true construction of the agreement in relation to this last pledge. It was held by the Bank as collateral for any bills of the Bank of New-Brunswick then unredeemed, or which might thereafter be unredeemed. I do not understand this to mean that the draft is collateral to pay any loss that the State Bank might eventually sustain in consequence of the actual inability of the Bank of New-Brunswick to pay after exhausting all their assets—but as collateral for such amount of bills as might be unredeemed at her counter in the usual course of business. This amount was necessarily indefinite at the time; but the State Bank had it in their power to make it definite at any time, by refusing to take any more bills. When the Bank of New-Brunswick failed and ceased redeeming their bills, then the amount became definite of necessity, and from that moment there was a sum certain, for the payment of which the State Bank had a security of one thousand dollars. Both pledges then stand on the same footing—both stand security for definite sums. They must both be applied to the extinguishment of the debts, and it makes no difference that the one will pay the whole and the other a part only. The same rule is applicable to both.

But it is unnecessary to pursue the argument. My opinion is, that the decision of the receivers be reversed as to the offset of one hundred dollars, and confirmed as to the other points.

Abraham Suydam v. The Receivers of the Bank of New-Brunswick.

It would be a delicate matter for the court, under any circumstances, to direct the receivers, appointed under the act entitled, "An act to prevent frauds by incorporated companies," to compromise a claim, when in their opinion there could be no demand against them to affect assets in their hands; and it would be much more delicate, in a case where the court has decided that the contract was void and could not be enforced.

Where a party knows that a bank has refused, from inability, to redeem its bills, he must be presumed to know of their inability to dispose of their property; and if, with such knowledge, he contract with the bank for the purchase of property, he has no equitable claim to the consideration of the court.

Appeal from the decision of the receivers of the Bank of New-Brunswick, under the eighteenth section of the act entitled an act to prevent frauds by incorporated companies, passed the sixteenth of February, eighteen hundred and twenty-nine, (*Elmer's Digest*, 36.) There had been a previous appeal between the same parties, growing out of the same transaction, and at July term, eighteen hundred and thirty-four, the decision of the receivers was in all things affirmed. For a full statement of the facts, and of the grounds of the decision, see the opinion of the chancellor on that appeal.*

G. P. Molleson, for the appellant.

E. Wood, for the receivers.

The Chancellor. After the Bank of New-Brunswick had suspended payment, in the month of February, eighteen hundred and thirty-four, Abraham Suydam, the petitioner, made a contract with the corporation, to purchase from them certain real estate in the city of New-Brunswick; for which he agreed to pay them a certain sum in the bills of the said bank, and to pay it in instalments. A written contract was entered into, and

* Ante, page 114.

deed was prepared and duly executed by the corporation, and deposited in the hands of a third person, to be delivered on payment of the bills. Before the day of payment, receivers were appointed by this court on the application of one of the creditors of the bank, and the whole property and effects of the institution passed into their hands as trustees for the benefit of all the creditors. At the time specified in the contract, Suydam tendered the bills to the receivers, and requested a deed. The receivers refused to ratify and confirm the contract, and thereupon Suydam appealed to this court to reverse their decision. After hearing the parties by counsel, the court ordered the decision of the receivers to be affirmed in all things. In concluding the opinion delivered in that case, the court said, "It is not intended by the opinion thus given to preclude any compromise or settlement from being made between the parties." The question before the court is, as to the correctness of the course taken by the receivers in refusing to affirm the contract, and nothing more. The petition, it is true, prays, that if the decision of the receivers should not be wholly reversed, the court may make such order and direction as shall be just and equitable; but the court is of opinion that nothing more is necessary or proper to be done at this time. In this matter the court sits in an appellate capacity, and has given its judgment on the only point decided by the receivers.

"Whether this is a case which, taking all circumstances into consideration, presents proper grounds of equity and good conscience for a compromise, and if so, upon what just and reasonable terms it should be made, is for the receivers to judge of in the first instance. It does not appear that any offers of compromise or adjustment have been made or considered, and of course the appellant is not aggrieved by any decision in relation thereto, for none such has been made."

After this opinion was pronounced, Suydam made three distinct propositions to the receivers, by way of compromise or adjustment. Neither of them was accepted by the receivers, and from their decision he again appeals.

The first proposition was, to pay to the receivers ten thousand

dollars in notes of the bank, for the property intended to be purchased of the corporation.

The second was, to relinquish entirely to the receivers part of the property, and give for the residue a certain sum in bills of the Bank of New-Brunswick, and a certain other sum in current bills of other banks, at par value.

The third proposition was, that the receivers should redeem the sum of two thousand dollars in notes of the bank, which amount he tendered them on the first day of May last under the contract, at par.

In not agreeing to either of these propositions, I am not prepared to say that the receivers erred. They have not considered it for the benefit of the trust to accept either of them; and resting on the ground that the petitioner had no just claim either in law or equity to have the contract carried into effect, or to ask damages for the non-performance, they have declined to act. It would be a delicate matter for this court, under any circumstances, to direct the receivers to compromise a claim, when, in their opinion, there could be no demand against them to affect the assets in their hands. It is much more delicate in a case like the present, when the court has on appeal solemnly decided, that the contract was void and could not be enforced. This fact forms the great obstacle in the petitioner's way. However honest his intentions may have been in making the contract, it must be considered that it was a voluntary act on his part, and doubtless with a view to gain. He knew well that the bank refused, through inability, to redeem their bills; it must be taken that he knew of the incompetency of the bank to dispose of their property while they refused to pay their debts, and he must have been willing to take the hazard on himself. In so doing, it is not perceived that he has any equitable claims to the consideration of the court; especially when it is to interfere with the rights of creditors, many of whom must be heavy sufferers by the failure of the bank.

It is worthy of remark, too, that it does not appear by the petition of the appellant that he had the bills which he seeks to

exchange for real property, on hand at the time the bank suspended payment. If he purchased them afterwards, and at a discount, he can scarcely ask for any extraordinary equity in his behalf at the hands of the court. If he was deluded by the officers of the bank, and that intentionally, he may have a remedy against them. If they, too, were deceived, (as I doubt not was the case,) in regard to the situation of the bank, I know of no relief for him.

The court, in the opinion heretofore delivered, did not intend to intimate that the receivers were under any obligation to compound this claim of the petitioner. It seemed, when the matter was up before, to be expected by the petitioner or his counsel, that if the court was of opinion that the receivers were not bound to fulfil the contract as entered into with the bank, it would direct what ought to be done by way of relief. The court stated the reason why it decided only the point appealed from; and stated further, that it was not intended thereby to preclude any compromise between the parties; but that it could not consider of any such matter before it had been passed on by the receivers. The whole matter of adjustment was intended to be left open, without advising either one way or the other; and I regret if I have been misunderstood, and thereby induced any additional expense to the parties.

The opinion of the court is, that the receivers have acted correctly and discreetly; and I am satisfied to confirm their decision in regard to the propositions made by the petitioner.

JOSEPH E. WEST v. LEWIS M. WALKER.

The ancient doctrine of the court of chancery was, not to interfere by injunction in cases of trespass, but to leave the party to his legal remedy. The practice of the court is now more liberal; yet in cases of trespass it still expects a strong case of destruction or irreparable mischief to be presented.

[West v. Walker.]

Cutting off the timber from a tract of pine land, valuable only or chiefly for the wood upon it, is not such a case of irreparable mischief as will warrant the granting of an injunction. (*a*)

Nor will the court interfere by injunction though the bill charges that the actual trespassers are poor and unable to respond. (*b*)

The rule formerly was that a complainant, by stating an adverse claim to the property, stated himself out of court. This is not now the case to the same extent as formerly; but where the complainant by his bill discloses a claim on the part of the defendant, and whence derived, he shows that there is a conflict in the title, and furnishes an additional reason why the court should not interfere in matters of trespass where no remediless injury is likely to be sustained.

BILL for injunction to restrain trespasses, filed the fifteenth of April, eighteen hundred and thirty-five. Upon filing the bill an injunction was granted by the chancellor, to restrain the defendant from cutting timber upon lands of the complainant. Before answer the defendant applied to dissolve the injunction for want of equity in the bill. The cause was heard upon the motion to dissolve. The material charges are fully stated in the opinion of the court.

White, (attorney-general,) in support of the motion, cited *Eden on Inj.* 136–8–9; 1 *John. Chan. R.* 318; 4 *John. Chan. R.* 21; 7 *John. Chan. R.* 322; 6 *John. Chan. R.* 487; 3 *Paige*, 213.

Wilson, contra, cited *Eden on Inj.* 136; 6 *Vesey*, 147; 7 *Vesey*, 305; 18 *Vesey*, 184; 2 *Dessaus.* 616.

THE CHANCELLOR. The bill states that one Somers, who died in seventeen hundred and ninety-five, was seized and possessed, at the time of his death, of upwards of three thousand acres of land in the county of Gloucester. In eighteen hundred and thirteen, the tract, together with other lands, was conveyed to George West, complainant's father, in fee, by Sarah Keen, who had full right to make the sale and to convey. George West possessed the property, and sold off more than one thousand

(*a*) (*b*) See notes at the end of the case.

acres, which is now possessed by sundry persons, holding under his title. He died in September, eighteen hundred and twenty-nine, seized at the time of his death of the residue of the property unsold; and soon after his death all his right became vested in the complainant by divers conveyances, and he entered into possession and still holds it. The property is chiefly covered with pine wood and timber, suitable for cord-wood, which constitutes its principal value.

That about two years since, Lewis M. Walker, the defendant, entered on a part of the premises and began to cut the wood and timber. Complainant instituted a suit against him under the timber act, before a justice of the peace, which was discontinued on the day of trial in consequence of the illness of the complainant. The defendant then desisted from cutting, and having removed his residence from the state, no other suit was brought. Complainant has lately visited the property and found laborers engaged in cutting and felling timber, who said they were workmen of Walker, and cutting by his order. Complainant has since been informed that defendant, under some claim or pretence of title to some part of said premises, has within a short time past been engaged in cutting wood and timber on them to a considerable amount. That he carries off the wood while green, contrary to usual practice; whence complainant concludes, that defendant, knowing he has no valid title, wants to put the wood out of complainant's reach. Since defendant last commenced cutting he has cut from three hundred to five hundred cords of wood, and complainant is informed and believes that he has made pretended sales of standing trees to different persons, to cut on shares; that they have proceeded to cut and carry away some wood and timber; and that these sales have been made to persons of little property, and unable to respond for the damage that may be sustained. That Walker is still cutting and wasting, and the complainant believes he will continue to do so unless restrained.

In the charging part of the bill, it is alleged that Walker, among other things, pretends to be seized of the whole or of cer-

parts of said premises by title derived from one William Keen. The complainant charges that Keen owned only of the property, and no part of that was ever conveyed to Walor any one from whom he may claim; but that all Keen's is now vested in him, the complainant, by divers sufficient urances. That Sarah Keen owned in fee certain other parts the premises now belonging to the complainant, in which William Jonas Keen never had any interest except in right of his ife, who survived him, he having died more than twenty years ago. That she, Sarah Keen, was seized at the time of her death and sold to the complainant's father.

There is the usual prayer for an account and an injunction.

On filing this bill an injunction was ordered to issue, according to the prayer of it. And now, without having answered, the defendant comes in and prays that the injunction may be dissolved or set aside, for want of equity in the bill. I have looked carefully into the subject, and am of opinion that the injunction was improvidently issued, and should now be set aside.

The case made by the bill is one of trespass. The ancient doctrine of the court was, not to interfere in cases of trespass, but leave the party to his legal remedy. As late as the time of lord Thurlow, there was no precedent for an injunction to restrain a trespasser. Afterwards, in *Flamang's* case, he relaxed the rule, because of the irreparable *ruin* which would have followed his refusal. See 7 *Ves.* 308. The same thing was done in *Robinson* v. *lord Byron*, 1 *Bro. C. C.* 588; but the court was very cautious in the exercise of the power. At this day the practice of the court is even more liberal; yet, in cases of trespass, it still expects a strong case of destruction or irreparable mischief to be presented. This is undoubtedly the true ground. This court ought never to interfere in the first instance, except in cases of pressing necessity. The only difficulty is, to apply the law to the multitude of ever-varying cases, which constantly present themselves.

In a case of trespass very similar to the present, for cutting and carrying the wood and timber from wood-land, principally valua-

ble on account of its timber, chancellor Kent refused an injunction, although it was alleged there as here, that the actual trespassers were poor and unable to respond. The court said, if the precedent were once set, it would lead to a revolution in practice; for trespasses of this kind are daily and hourly occurring. In *Garstin* v. *Asplin and others*, the general principle is held, that the court cannot interfere in a naked trespass where there is a full remedy at law: 1 *Mad. R.* 90. And in *Livingston* v. *Livingston*, 6 *John. Chan. R.* 497, the court said, there must be something particular in the case, so as to bring it under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy. The same doctrine is maintained in the case of *Jerome* v. *Ross*, 7 *John. Chan. R.* 333, and it is asserted to be the true rule of both English and American courts of equity.

It is important to preserve this principle. The courts of common law are the proper tribunals to dispose of actions of trespass. To introduce them generally into this court, would occasion great trouble and additional expense, and must necessarily lead to the frequent investigation of legal titles.

On examining the case before me, I do not discover in it any of those peculiar circumstances which will justify me in taking it out of the general rule. Considering it in the most favorable light for the complainant, the party defendant is simply a trespasser. He has entered upon the plaintiff's property and is cutting wood. It is pine land, and he is using it as others use property of that description, and in the only way in which it can be used. Several laborers, according to the bill, have been engaged in felling timber, and have cut from three to five hundred cords of wood. This can scarcely be considered an irreparable injury to a tract of over two thousand acres of land. There is nothing to prevent a recovery at law, and the party must seek his remedy there.

It would seem, too, from the bill, that the defendant sets up an adverse claim to the land, or to some part of it. This presents an additional difficulty in the way of an injunction, especially when

there is no suit at law pending, or offered to be brought, to establish the right. The law formerly was, that a complainant, by stating an adverse claim to the property on the part of the defendant, stated himself out of court. This is not now the case to the same extent as formerly. But when the complainant undertakes to disclose in his bill a claim on the part of the defendant, and what the claim is, and whence derived, as is done in this case, he shows that there is a conflict as to the title, and furnishes an additional reason why this court should not interfere in matters of trespass, where no remediless injury is likely to be sustained.

The authorities cited by the complainant's counsel are distinguished from this case. In *Mitchell* v. *Dors*, 6 *Ves.* 147, an injunction was granted against one who, having begun to get coal from his own ground, had worked into that of the plaintiff. Lord Eldon went on the authority of lord Thurlow in *Flamang's* case, and considered it a case of irreparable mischief; whether justly or not, is not material as to the principle. In *Hanson* v. *Gardiner*, 7 *Ves.* 305, there is nothing decided material to the point involved in this case. The chancellor reviews some of the authorities, and concurs in opinion, that an injunction may issue in cases of trespass, to prevent irreparable mischief. In the case of *Thomas* v. *Oakley*, 18 *Ves.* 184, the defendant was injoined from taking more stone out of a quarry than he was entitled to; and that, too, is founded on the opinion of Thurlow in *Flamang's* case. Lord Eldon asks if there can be any distinction between a stone quarry and a lead mine? "Is not this (he inquires) taking away the very substance of the estate, just as much as in the case of a coal mine?" Now, admitting there is no difference between a quarry and a mine, does not the taking of coal from the one and lead from the other differ materially from cutting and taking away wood and timber from our pine lands? The first can never be replaced; the other is comparatively a temporary loss—a few years may replace it.

It is very evident that some confusion has been introduced into this branch of equity jurisdiction by extending the injunction to

cases of trespass. Lord Eldon, with all his caution and forecast, was evidently embarrassed in attempting to carry out the innovation. And, doubtless, there will always be differences of opinion as to what shall be considered an irreparable injury, such as cannot be compensated by damages. Human wisdom is unable to lay down any general rule that will be applicable to all cases. Each one, as it arises, must be judged in some measure, by its own peculiar circumstances. The present is one which, in my opinion, does not warrant the interference of this court in the first instance. If the complainant will proceed at law, and clearly establish his right, and the defendant shall persist in repeated acts of trespass, equity may then interpose to quiet possession and to prevent a multiplicity of suits.

The injunction must be set aside, but without costs.

NOTE A.

A very frequent ground of application for injunction in this state, and perhaps the most important, is that of restraining the waste or destruction of timber. These applications are usually made in cases of disputed title to unenclosed wood lands, where the soil is unproductive, and the timber constitutes almost its entire value. The case disclosed in the bill is ordinarily that of a continuous or oft-repeated trespass, the complainant alleging title and possession in himself, and that the defendant is engaged in cutting off the timber, to the irreparable injury of the inheritance. Since the decision in *West* v. *Walker*, contained in the text, it has been understood that an injunction would not be granted under such circumstances, though an action at law were depending for the trial of the title, unless there was some special matter charged in the bill, to take the case out of the general rule—that an injunction will not lie in a case of mere trespass. Upon such a state of facts the injunction has been repeatedly denied at chambers, though not upon argument. The only case

recollected, in which the question has been directly before the court upon argument, since the decision contained in the text, is that of *Shreve* v. *Black and McKnight*, argued in December, A. D. eighteen hundred and forty-one. The bill in that case states title and possession in the complainant, and a claim of title by the defendants; charges a trespass by the defendants for which an action at law was immediately instituted and is still pending undecided; repeated trespasses by the defendants since the commencement of the suit at law; and that at the time of filing the bill the defendants were engaged in cutting and clearing off the timber and converting wood land into arable land; and that they threatened to cut off the greater part of the wood upon the tract. Upon filing the bill, notice of the application was, by order of the chancellor, given to the adverse party, and the cause came on for hearing at a special term. On the eve of the argument, one of the defendants answered, denying the complainant's title and possession. The chancellor refused the application, upon the ground that the answer had denied the whole equity of the bill, without expressing a decided opinion upon the case made by the bill. He said, "I confess that the discussion before me, and the tracing of the English cases, has staggered my faith in the view which has been taken by some of my predecessors on this subject. Injunctions have repeatedly been granted in cases of mere trespass, and that too when committed under pretence of title. The complainant, by stating the injury to have been committed under allegation of title, does not state himself out of court, as to the injunction. This kind of injury, too, by cutting timber on land where it constitutes its chief value, is an irreparable injury."

If, however, the injunction will be dissolved upon the ground that the title or possession, or both, of the complainant is denied by the answer, it is obvious that the injunction will afford no protection in cases of disputed title to unenclosed lands. Both parties have frequently a title *prima facie* valid; neither has the actual *pedis possessio*, or any further possession than is evinced by occasional acts of ownership. The dispute is very

frequently a mere question of location or boundary. Under these circumstances, is the property to become the spoil of the most rapacious or grasping claimant? Is the party in possession to be despoiled of his inheritance by a mere trespasser, without his consent and against his will; or will chancery not only grant the injunction, but continue it, notwithstanding the defendant's answer, until the title is determined at law? If not, then the extraordinary anomaly is presented, that if the complainant abandons his possession, admits the possession of the adverse claimant, and brings an ejectment to recover possession, a court of law will protect his property from destruction; but if he insists upon his possession, he must submit to the utter destruction of his inheritance, for neither a court of law or equity will protect it.

It is the constant practice in courts of law, in actions of ejectment, before trial, to grant a rule to restrain the defendant from committing waste or destruction during the pendency of the action. "Where there is a contest for land, courts of law will, as far as possible, keep the property from waste, and in the state in which it was at the time when the suit commenced:" *Den* v. *Kinney*, 2 *South.* 552; *Bush* v. *Phillips*, 3 *Wend.* 428; *Denning* v. *Corwin*, 4 *Wend.* 208. And the rule is granted, as well where the defendant claims by an adverse title, as in cases of technical waste, or where there is a privity between the plaintiff and defendant. Courts of law will also, in actions of dower, grant a rule upon the defendant, though he be the owner in fee of the land, to stay waste pending the action: 2 *South.* 717.

The policy of the court has been, to preserve the property in dispute from waste or alteration pending the action, as far as practicable, without interfering with the ordinary use of the property by the party in possession.

The ancient doctrine, that a court of equity will not interfere by injunction to prevent trespass or waste where the title is in dispute, has been materially qualified. The court has repeatedly interfered in such cases, not for the purpose of trying the legal

right, but to preserve the property unchanged, until the title is tried at law; and for this purpose the injunction will be granted against a party in possession, claiming by an adverse title.

As early as the year eighteen hundred and eight, in *Shubrick* v. *Guerard*, 2 *Dess.* 616, chancellor Rutledge granted an injunction to restrain the defendant from cutting timber and committing other waste, until the trial and determination at law of the rights of the parties; the defendant being in the possession of the land, which he claimed by an adverse title, and there being a suit pending to try the title at law.

In *Jones* v. *Jones*, 3 *Mer.* 173, on demurrer to a bill by an heir at law, for an injunction to restrain the devisee in possession from committing waste and destruction, the will being in dispute, sir William Grant, master of the rolls, said, "No case was cited in which the court interfered, at the suit of an heir or devisee, to restrain waste or destruction by either, while they are litigating their adverse rights in a court of law;" but he added, "I own I cannot see a very good reason why the court which interferes for the preservation of personal property in the ecclesiastical court, should not interfere to preserve real property pending a suit concerning the validity of the devise." In this case the demurrer was sustained, as it would seem, mainly, if not entirely, on the ground that the party applying for the injunction, was not proceeding with due expedition to bring the question of title to a decision.

In *Fingal* v. *Blake*, 2 *Molloy*, 50, (12 *Eng. Con. Chan. R.* 337,) an injunction was granted, on the application of a devisee, to restrain the heir at law in possession from cutting timber, although the will was not established and the title was disputed as between the devisee and heir at law; and the lord chancellor (Hart) says, "I have long doubted the soundness of the old decisions with respect to waste. I think the court has jurisdiction to restrain waste by the heir disputing the will of real estate, and will do so at any time on motion. I have no doubt that the court will now, in such a case, readily exercise its powers to prevent irreparable injury to the property."

In *Pillsworth* v. *Hopton*, 6 *Ves.* 51, and in *Storm* v. *Mann*, 4 *John. Chan. R.* 21, injunctions were denied against the party in possession claiming by a title adverse to the plaintiff. It is worthy of remark, that in the former case no action at law was pending to try the title, and in the latter the ejectment had been pending nearly eighteen months without having been brought to a trial. The chancellor, however, places the decision on the doctrine that equity will not interfere until the title is determined at law. It does not appear in either case how long the cutting had been continued, nor to what extent it was carried.

In cases of mere trespass, courts of equity have repeatedly held, that where the damage was great and irreparable, or by constant repetition calculated to do lasting injury to the inheritance, they would interfere to prevent the evil, and this where the right was disputed. See *Flamang's* case, cited in *Hanson* v. *Gardiner*, 7 *Vesey*, 307; *Robinson* v. *lord Byron*, 1 *Bro. C. C.* 586; *Mitchel* v. *Dors*, 6 *Vesey*, 147; *Courthope* v. *Mapplesden*, 10 *Vesey*, 290; *Crockford* v. *Alexander*, 15 *Vesey*, 138; *Twort* v. *Twort*, 16 *Vesey*, 128; *Kinder* v. *Jones*, 17 *Vesey*, 109; *Earl Cowper* v. *Baker*, 17 *Vesey*, 128; *Grey* v. *duke of Northumberland*, 13 *Vesey*, 236, and 17 *Vesey*, 281; *Thomas* v. *Oakley*, 18 *Vesey*, 184; *Whitechurch* v. *Holworthy*, 19 *Vesey*, 213; *Shubrick* v. *Guerard*, 2 *Dess.* 622 *n.*; *Livingston* v. *Livingston*, 6 *John. Chan. R.* 500; *Southard* v. *Morris Canal and Banking Co.*, *Saxton*, 518; *N. Y. Printing and Dying establishment* v. *Fitch*, 1 *Paige*, 99.

An important inquiry would seem to be, whether the cutting of the timber is carried, or threatened to be carried to such an extent as to create a case of irreparable mischief, or to put the value of the inheritance in jeopardy. The case in the text, of *West* v. *Walker*, does not go the length of deciding that cutting off all the timber upon the premises is not a case of irreparable mischief.

The distinction suggested by the chancellor, between cutting timber, and taking ore from a mine or stone from a quarry, does not seem to be countenanced by the authorities.

"This protection" (of injunction to restrain trespasses on the ground of preventing irreparable mischief, and the destruction of the substance of the inheritance) "is now granted in the case of *timber*, coals, lead ore, quarries, &c.:" *Livingston* v. *Livingston*, 6 *John. Chan. R.* 499.

"If this protection would be granted in the case of *timber*, coals, or lead ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered: *Thomas* v. *Oakley*, 18 *Vesey*, 187.

"Lord Thurlow changed his opinion upon that, holding that if the defendant was taking *the substance of the inheritance*, the liberty of bringing an action was not all the relief to which in equity he was entitled. The interference of the court is to prevent your removing *that which is his estate*:" *Thomas* v. *Oakley*, 18 *Vesey*, 186. See also *Courthope* v. *Mapplesden*, 10 *Vesey*, 290; *Hamilton* v. *Worsefield*, 10 *Vesey*, 290, *note c.*; *Crockford* v. *Alexander*, 15 *Vesey*, 138; *Twort* v. *Twort*, 16 *Vesey*, 128; *Kane* v. *Vanderburgh*, 1 *John. Chan. R.* 11.

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NOTE B.

There is no charge in the bill that Walker, the defendant, was insolvent or unable to respond in damages at law, and the omission is adverted to and insisted upon by the attorney-general in his argument. The charge is merely, that certain individuals to whom Walker had sold portions of the property, and who were not made defendants, were unable to respond. The court will interfere to prevent a mere trespass, where *from the irresponsibility of the defendants* or otherwise, the complainant could not obtain relief at law: *Hart* v. *Mayor of Albany*, 3 *Paige*, 214; Accord. *Smallman* v. *Onions*, 3 *Bro. Cha. R.* 623.

And the practice in New-Jersey is believed to be in accordance with these decisions. In *Read* v. *Cornelius*, which was a bill

for an injunction to restrain a trespass, at July term, eighteen hundred and thirty-seven, chancellor Dickerson intimated that he would allow the injunction, if the bill charged that the defendant was insolvent or unable to respond in damages; and in *Norcross* v. *Fisher and Jaggard*, an injunction having been allowed by a master, the bill charging the inability of the defendants to respond in damages, chancellor Pennington, at June term, eighteen hundred and forty-one, refused to dissolve on motion, and put the defendants to their answer.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

OCTOBER TERM, 1835.

JOSEPH H. FENNIMORE and others v. SAMUEL FENNIMORE, and the Administrators of THOMAS FENNIMORE, deceased.

Executors are not necessarily liable for each other's acts, or responsible for the money which comes to each other's hands.

As a general rule, each executor is answerable for no more than he receives.

Where a testator by his will directs that if either of his executors, at public sale, purchase any part of his real estate, the other executor shall execute a deed conveying the land so purchased, either of the executors has a right to purchase, and the other is bound to execute the necessary conveyance.

The purchaser may retain the purchase money in his own hands as assets, and his co-executor can neither compel him to pay it nor to give security for its payment as a condition of executing the deed.

It has been repeatedly decided in this court, that where executors account jointly, without specifying the amount of receipts and disbursements by each and showing the balance in each one's hands, they are all concluded and bound. Does this principle prevail? *Quere.*

After a general settlement is made by executors or administrators in the usual way, the orphans' court have no power to adjust difficulties between them respecting their receipts and disbursements. These are private matters over which the court has no jurisdiction.

Where executors exhibit a joint account, and connected therewith a separate account showing the receipts and disbursements of each executor, and the

court decree an allowance of the account as stated, the joint account must be considered as qualified and explained by the separate one.

BILL by legatees against one executor and the administrators of a deceased co-executor, for the recovery of a legacy and an account. The surviving executor was unable to respond. The estate of the deceased executor, by whom the larger part of the estate had been received, was solvent. The bill sought to charge both executors with the amount due upon the legacy. A decree pro confesso was taken against the surviving executor. The administrators of the deceased executor answered, stating the amount of the estate which had come to the hands of their intestate, and insisting that his estate ought not to be held liable beyond that amount. The master having reported the amount which came to the hands of each of the executors, and the report having been confirmed, the case was heard upon the equity reserved. The only question submitted, was as to the extent to which the executors were respectively liable.

Wall, for complainants.

Brown and *H. W. Green*, for defendants.

THE CHANCELLOR. Samuel Fennimore, and Thomas Fennimore, now deceased, were executors of the last will and testament of Thomas Fennimore, the elder, deceased. The residuum of the estate was directed to be divided into five equal shares. One of those shares he directed to be placed at interest, and the interest arising therefrom to be paid annually to his son John Fennimore, during his natural life, and after his death, the principal with the unexpended balance of the interest, if any, to be paid to John's children. John having died in eighteen hundred and twenty-nine, this suit was instituted to recover the legacy. It was referred to a master to take an account, and ascertain the balance of the estate, or the residuum, after payment of debts and specific legacies; and also to ascertain in whose hands

the money actually was, and what sums were in the hands of the said executors severally. The master reported the residuum to be twenty thousand one hundred and fifty-four dollars and five cents, on the seventh of November, eighteen hundred and fifteen—the one fifth part of which is equal to four thousand and thirty dollars and eighty-one cents; and that the whole amount of principal and interest due to the complainants on the ninth of January, eighteen hundred and thirty-five, was seven thousand and eighty-seven dollars and sixty-eight cents. He also reported that of this amount there was

In the hands of Samuel, - -	$2632 22
In the hands of Thomas's administrators,	4454 78

The report of the master has been confirmed, and the cause is now set down on the equity reserved. The only question raised is as to the joint liability of the two executors. Samuel is supposed to be in failing or doubtful circumstances, and if the estate of Thomas, his co-executor, is not liable for the assets in the hands of Samuel, the complainants may lose a portion of their legacy.

Executors are not necessarily liable for each other's acts, or responsible for the money which comes to each other's hands. As a general rule, they are answerable for no more than they receive; but by their own conduct they may make themselves answerable in a variety of ways.

In the case under consideration, it is contended that Thomas or his estate should answer for the probable defalcation of Samuel, because Samuel was a purchaser at public sale of real estate of the testator, to the amount of three thousand seven hundred and twenty-two dollars and twenty-three cents; and Thomas executed a conveyance to him for the land so purchased, without receiving the purchase money or taking any security for the payment.

The executors were children of the testator, and for aught that appears, both enjoyed his confidence in an equal degree. In the will he directed his lands to be sold at public sale. The testator, it would seem, anticipated that these sons might become

purchasers of part of it, and he was careful to make provision for the contingency. The fourth item or devise of the will is as follows:—"As the execution of my will makes it necessary that my real estate should be sold, I direct my executors and the survivor of them to make public sale thereof, within one year after my decease, and to execute legal conveyances thereof to the purchaser or purchasers: and should either of my executors at public sale become a purchaser of any part of my said real estate, I will and order that the other executor do make to the other so purchasing, a deed or deeds conveying the same; which deed or deeds so made by one of my executors to the other, shall convey a fee simple in the said real estate, and be as good and effectual as their joint deed or deeds would be to any other purchaser."

By this clause either executor had a right to purchase, and the other was bound to make the necessary conveyance, and could not withhold it. The purchase money was so much of the assets of the estate. It was in the hands of one of the executors, and I do not see upon what principle the other could compel the payment of the money over to him. Samuel was bound to pay this purchase money in a due course of administration, but he was not bound to pay it to Thomas, his co-executor; and if not bound to pay, he could not be required to give security for it. Such security could only have been taken for the payment of the money to Thomas, and not for the payment of it to the legatees. Thomas had no right to require security in favor of the legatees. That could be done only in a particular mode pointed out by the statute. It could only be required of Samuel as a purchaser; and as I have already remarked, Samuel being both purchaser and executor, and the consideration being assets in his hands, he had a perfect right to retain it as against the other executor.

If Thomas had demanded security of Samuel, a similar demand would doubtless have been made by Samuel of Thomas, who was also a purchaser. The result would have been, that this part of the assets would have changed hands. The purchase money for the property purchased by Samuel would have gone to Thomas, and that for the property purchased by Thomas

would have gone to Samuel. No security would have been furnished to the legatees by such a change; and in this case the result would have been disastrous to them, for the amount of real estate purchased by Thomas was greatly larger than that purchased by Samuel, and of course Samuel would have had much more money in his hands than he now has.

I can see no justice or equity in charging the estate of Thomas, on this ground.

It is insisted, in the next place, that the executors have accounted jointly in the orphans' court, and that they are jointly bound by the decree of the court on the final settlement of the account.

It has been decided in this court in more than one case, that where executors account jointly, without specifying the amount of receipts and disbursements by each, and showing the balance in each one's hands, they are all concluded and bound. The decisions rest on the principle, that the decree of the orphans' court upon a final settlement, is in the nature of a judgment; and that after such judgment, the parties cannot be permitted to set up any matter in avoidance of its operation. Such was the decree of this court in the case of *Philemon Dunn et al.* v. *The Executors of Gershom Dunn, deceased*, in April term, eighteen hundred and twenty-nine.* That decree, however, was subse-

* The interlocutory order in this case, made by chancellor Williamson, on the twenty-eighth of October, A. D. eighteen hundred and twenty-eight, upon which the final decree was grounded, omitting the formal parts, is as follows:—

"It appearing to the court that the decrees of the orphans' court of the county of Middlesex, the one made in the term of June, in the year of our Lord eighteen hundred and eight, and the other in the term of September, in the year of our Lord eighteen hundred and eleven, allowing and confirming the accounts of the said B. F. R. and P. F. R., executors of the last will and testament of Gershom Dunn, deceased, as aforesaid, are final decrees, made upon due notice and advertisement thereof, given and published by the said executors, as prescribed by law, and that the same were made on final settlement of the accounts of said executors; and that they ought to be and are, final and conclusive between the parties, as well the complainants as the said defendants, as to the matters contained therein and established; and that the defendants, executors as aforesaid, ought to be jointly charged with the balance found in their hands by

quently reversed in the court of appeals in the last resort, and upon that very point, and the reversal was calculated to unsettle the course of decision on this important question.

In this case, however, the representatives of Thomas Fennimore deny that the account, as finally settled in the orphans' court, was such a joint account as to be within the rule adopted by this court, supposing that rule still to be operative.

The account appears to consist of two parts. The first is a general account, showing the receipts and disbursements of the executors, and the general balance in their hands in favor of the estate. It is headed in the usual form, viz.: "The account of Thomas Fennimore, esquire, and Samuel Fennimore, executors of the last will and testament of Thomas Fennimore, late of the county of Burlington, deceased, as well of and for such and so much of the goods, chattels and personal estate, and the net proceeds of the real estate of the said deceased, sold by the direction of his will, as have come to their hands to be administered,

the last mentioned decree of the said orphans' court. It is thereupon ordered, adjudged and decreed, that it be referred to L. K. esquire, to take an account between the said parties of the estate of the said testator which came into the hands of the said B. and P. F. R., executors as aforesaid, or which with due diligence might have been received by them, &c. And that the said accounts be taken subject to the said decree of the said orphans' court, and the accounts of the said executors therein and thereby confirmed, and without in any wise varying or impeaching the same."

An appeal from this decree was taken by B. F. R., one of the executors, and at May term, A. D. eighteen hundred and thirty-one, the decree of the chancellor was reversed by the following vote, viz.: For reversal, councillors Dow, Wright, Mickle, Townsend, Capner, Condict, Seeley and Robbins—8. For affirmance, councillors Board, Green, Shinn, Newell, Ryerson, and the president, (Vroom) 6.

The statute (*Elmer's Digest*, 365, *sec.* 32) enacts, that "The sentence or decree of the orphans' court, on the final settlement and allowance of the accounts of executors, administrators, guardians or trustees, shall be conclusive upon all parties, and shall exonerate and for ever discharge every such executor, administrator, guardian or trustee from all demands of creditors, legatees or others, beyond the amount of such settlement, except for assets or moneys which may come to hand after settlement as aforesaid, excepting also in cases where a party applying for a re-settlement shall prove some fraud or mistake therein to the satisfaction of the orphans' court."

as for their payments and disbursements out of the same." On the debit side of the account, the charges are general. On the credit side, the disbursements of the two executors are separated. The payments made by Thomas are specified and credited to him, and in like manner the payments made by Samuel are credited to him separately. The balance struck and reported by the surrogate is a general balance.

The second part of the account purports to be a separate account between the two executors, and is headed as follows:— "The said executors charge themselves and pray allowance for the aforesaid assets and disbursements as between themselves, and in their separate hands, as follows"—and then is given a statement of the amount of assets received by each executor.

These two accounts appear to have been considered by the surrogate and the court, as separate parts of one and the same account, exhibiting at one view the full net amount of the residuum, and the different parts of it, in the hands of each of the executors. Both appear to have been stated by the surrogate, and passed on by the court. The order for allowance is as follows: "The surrogate having reported this account for allowance, and the same appearing to have been advertised according to law, and no exceptions made thereto, it is therefore decreed that the same be allowed in all things, as reported by the surrogate." Further than this there is no adjudication or decree of the court, and for aught that appears the account as filed is the only evidence of the settlement. This is certainly a loose mode of doing business; but we all know that the manner of settling these accounts is not uniform. It differs in different counties, and will continue to do so, as long as the present organization of that court is permitted.

There must have been some object in stating the account in the way in which it appears; and I think it very evident the object was to show the amount of assets in each one's hands, and to have their separate liabilities adjusted and sanctioned by judicial authority. For any other purpose, the interference of the court was neither necessary nor proper. If the executors

merely wished to know for their own satisfaction what proportion of the funds was in each one's hands, it could have been ascertained without the aid of the court. It was entirely a private concern between the two executors, and the court had no cognizance of it. In all final settlements, its decrees are intended to operate and do operate upon the rights of creditors, legatees and next of kin. These settlements are made for their benefit. They are considered as parties. Public notice must be given, and they are bound by the decree of the court. But after a general settlement is made by executors or administrators, in the usual way, and those entitled to receive the estate are all paid and satisfied, if difficulties should arise between the executors or administrators themselves, as to their receipts and disbursements, the orphans' court would have no power to adjust them. They are private matters, over which they have no jurisdiction.

It is right to consider that the court acted, and intended to act, within its legitimate authority. The executors had a right to present their accounts separately, and to do it under the general notice. The court had authority to decree what proportion of the estate was in each one's hands, and how each one was to be charged; and having so decreed, we are to consider it as operative and binding on the rights of the parties; and the joint account must be considered as qualified and explained by the separate one.

I think, therefore, that even if the principle as declared by this court in the case of *Dunn* v. *Randolph* be considered as in force, that a joint settlement creates a joint liability, this case is not fairly within it.

Apart from that settlement, there is nothing to charge the estate of Thomas with any default of Samuel, his co-executor. The equity of the case is the other way. It has been shown that for so much of the money or assets as came to the hands of Samuel from the purchase of the real estate, Thomas was not responsible. And as regards the personal property received by Samuel, the master states in his report, that there was no evi-

dence laid before him showing the manner of the original receipt, or any agency of Thomas Fennimore therein, or control over it, or accountability for it, (unless it may be found in the deposition of Margaret Fennimore,) except what appears upon the account filed and settled. I have examined the deposition referred to in the report of the master, but do not think there is any thing in it of sufficient importance to affect the liabilities of the executors.

Upon the whole case, I am of opinion that the estate of Thomas is only liable to pay the amount which was in his hands, according to the report of the master, and is not bound for any default of Samuel, the co-executor.

Decree accordingly.

JOSEPH STARK et al. v. GEORGE HUNTON et al.

If the collection of a debt due an estate is neglected by the executors for three years, and the debtor then fails, the executors will be held accountable for the amount.

If the executors, in their discretion, are satisfied that there is nothing due the estate upon a claim included in the inventory and appraisement, they will not be charged with the amount unless it be made to appear that the amount was really due.

If the executor take no step for two years for the recovery of a note, and the maker becomes insolvent, such negligence will charge the executor. It cannot be reconciled with good faith or the exercise of a sound, reasonable discretion.

The true rule in computing interest is, that where partial payments are made exceeding the interest due, the surplus is to be deducted from the principal, and the balance forms a new principal on which to compute interest; but where the payments do not equal the interest due, no deduction is made, and interest is cast on the principal until the payments exceed the amount of interest.*

If an executor, without inquiry or examination, pay a claim against the estate where nothing is really due, he will be charged with the amount.

* Accord. *Meredith* v. *Banks*, 1 *Hals.* 408; *Connecticut* v. *Jackson*, 1 *John. Chan. R.* 17; *Stoughton* v. *Lynch*, 2 *Ibid*, 209; *Lightfoot* v. *Price*, 4 *Hen. and Munf.* 431; *Williams* v. *Houghtaling*, 3 *Cowen*, 87, *note a.*

[Stark v. Hunton.]

Where a claim is barred by the statute of limitations, at the time of the testator's death, and the debt is to be satisfied out of the real estate, both the executors and the devisees have a right to avail themselves of the statute in defence, and no acknowledgment of the personal representative will bind the lands in the hands of the devisee.

But where a claim is not barred by the statute at the testator's death, though no proceedings are had against the heir or devisee within six years from the time the action accrued, the claim will not therefore be considered as barred by the statute, but shall be paid out of the proceeds of the land when sold for the payment of debts.

* BILL filed on the eleventh of July, eighteen hundred and twenty-nine, by Joseph Stark, administrator of Jane Stark, formerly Jane Weller, deceased, and in his own right; Alexander C. Stark and Benjamin W. Stark, infants, by Joseph Stark their next friend; and by Daniel K. Allen and Mary his wife, late Mary Weller.

The bill states, that Benjamin Weller, late of Aquackanonck, in the county of Essex, being seized and possessed of considerable real and personal estate, on the sixth of June, A. D. eighteen hundred and twenty-three, executed and published his last will and testament in due form of law to pass real estate, as follows: that is to say, "Be it remembered, that I, Benjamin Weller, of Paterson, in the county of Essex, and state of New-Jersey, do make and publish this my last will and testament, in manner and form following; that it to say, *First*, it is my will and I do hereby direct my executors herein after named, to pay all my just debts and funeral expenses out of my personal estate, and out of the proceeds of such of my real estate as is herein after directed to be sold by my executors.

"*Secondly*, I give, devise and bequeath unto my wife Jane, all my tavern-house and lot where I now live, together with the furniture and stock in the same: to have and to hold to my said wife Jane during her natural life, provided she remains my widow; but in case she should marry again, then it is my will that my said tavern-house and lot and furniture be disposed of according to law.

* See Saxton, 216.

"And it is my will, and I do hereby order and direct my executors herein after named, or the survivor or survivors of them, to sell, dispose of and convey my hat-shop and lot on the corner of the old York road and turnpike road in the town of Paterson; also, a half-acre lot, and a small lot of about forty feet front, situate on the road leading from Paterson to the white house, or either of them, as my executors may think necessary or proper for the interest of my widow and children: and it is my will that the proceeds of the sale of said lots or of such of them as my executors shall sell, shall be applied to the payment of my debts.

"And I do hereby constitute and appoint my wife Jane executrix, and doctor William Ellison and Philemon Dickerson, of Paterson, executors of this my last will and testament."

The testator died on the eleventh of June, eighteen hundred and twenty-three, leaving four daughters, (viz. Jane, who intermarried with the complainant, Joseph Stark; Mary, who intermarried with D. K. Allen; Elizabeth, and Margaret,) and three sons—his only children and heirs at law.

That the widow, Jane Weller, and P. D., shortly after the testator's death, duly proved the said will and took upon themselves the burthen of the execution thereof, and possessed themselves of the personal estate and effects of the said testator, and on the eleventh of October, A. D. eighteen hundred and twenty-three, made and filed an inventory and appraisement thereof in the surrogate's office of the county of Essex, amounting to four thousand seven hundred and eighty-one dollars and fifty-nine cents.

That on the twentieth of March, A. D. eighteen hundred and twenty-four, the executors sold and conveyed part of the testator's real estate, consisting of the hat-shop and lot in Paterson, to one J. F., for eight hundred and fifty-five dollars: that the further sum of three hundred dollars had been paid to the executors for a lot of land which belonged to the testator, situate in the county of Bergen; but that the half-acre lot, and a small lot of about forty feet front situate on the road leading from Paterson

to the white house, and by the will of the said testator directed to be sold, remain undisposed of.

That Jane Weller, the widow of the testator, accepted the gift, devise and bequest intended for her in said will, and thereby became barred of her dower in the real estate of the testator; and by virtue of said devise and bequest, she took possession of the tavern-house and lot, and with the consent of the said P. D., executor as aforesaid, she also took possession of the furniture in the said tavern-house, subject to the proviso contained in said will, viz.—to have and to hold to her during her natural life provided she remained his widow, but in case she should marry again then that the said tavern-house and lot and furniture should be disposed of according to law.

That the said Jane, the widow of testator, on the twelfth of November, eighteen hundred and twenty-eight, intermarried with G. H., and thereby forfeited all right and interest in the gift, devise and bequest intended for her in said will, and that the fact of said marriage was known to the said P. D.

That the said Jane, the testator's widow, had always since the death of the testator lived upon the premises devised to her, and taken the rents, issues and profits thereof, and also used and enjoyed the stock and furniture in the same, until her intermarriage with G. H. That shortly after his marriage with the said Jane, the said G. H. took possession of the premises previously occupied by her, and has since continued to reside therein: that he also, with the consent of the said P. D., executor as aforesaid, possessed himself of the furniture held by the said Jane, and sold a part thereof, and still keeps possession of the residue; and has also, with the said Jane, entered into the possession and receipt of the rents, issues and profits of the real estate, devised to the said Jane as aforesaid.

That Jane Stark, one of the daughters of the testator, died on the nineteenth of April, A. D. eighteen hundred and thirty-eight, intestate, leaving A. C. S. and B. W. S., two of the complainants, both infants under the age of fourteen years, her chil-

dren and heirs at law, and that administration of her estate was duly granted to the complainant, J. S.

Prayer, that the will of the said testator may be established and its trusts carried into execution: that a receiver may be appointed of the rents and profits of the real estate devised to the said Jane, and that an injunction may issue to restrain the said G. H. and Jane his wife from receiving any of the said rents, or any of the assets belonging to the estate of the said testator.

A decree pro confesso was taken as to part of the defendants, and after various proceedings in the cause it was referred to a master to take an account of the personal estate of the said testator, and also of moneys received from the sale of the real estate. The master having made his report, exceptions were taken to the report by D. K. Allen and wife, two of the complainants, and the cause now came on for hearing upon the exceptions.

E. Vanarsdale, jun. for exceptants.

Dickerson and *I. H. Williamson*, for the executors.

THE CHANCELLOR. The first exception is, that the master has omitted in schedule 1, to charge P. Dickerson, executor, with the sum of eighty-four dollars and ninety-three cents, received by him from Joseph Law; and also the sum of one hundred and twenty-four dollars and thirty-four cents, received by him from the sale of the hat-shop, over and above what he is charged with on that account.

The first part of this exception has originated out of the mode in which the master has stated the account. The estate had a claim against Joseph Law of ——— dollars, which constituted a part of the inventory. Hunton and wife are credited for the amount of this claim, as having come to the hands of P. Dickerson, the co-executor. In his account he is not charged with it. Hence it would appear to have been omitted by some casualty. The truth is, however, that Law had an account against the estate of a larger amount, and this claim was taken to pay that

count; and after satisfying it as far as it would, there was still balance due Law from the estate of three dollars and ninety-ur cents, which was paid by Mr. Dickerson, and for which he as a receipt and is credited. Vide Exhibit A. No. 22, on the rt of the executors. The better way, perhaps, would have en, to charge Dickerson with the amount for which Hunton d wife were credited, and then to have credited him with the hole amount of Law's account. It would have swelled the count; but as the claim against Law was in the inventory, and d to be accounted for in some way, it would have rendered the tement more intelligible, and probably saved the exception. It however, substantially right as it stands.

The sum of one hundred and twenty-four dollars and thirty-ur cents, mentioned in the second part of the exception, is in-uded in the master's report. The hat-shop was sold for eight undred and fifty-five dollars. Dickerson charges himself with ven hundred and thirty dollars and sixty-six cents, in his sepa-te account. The balance being due from doctor Ellison, the rchaser, is credited on a note which he held against the estate, d is therefore justly accounted for. See Schedule 9 to mas-r's report.

This first exception must be overruled.

The second exception is admitted to be well taken, and is al-ged by the executor to be a casual mistake on the part of the aster.

The third exception is to a credit allowed to them of one hun-ed and ninety-four dollars and twenty-one cents, for moneys id by Hunton and wife to the Paterson Lodge, per A. Parsons. The account paid is against Benjamin Weller the testator, as asurer of the Lodge, commencing in eighteen hundred and enty-two, and ending in March, eighteen hundred and twenty-ree. The receipt is dated January twenty-sixth, eighteen hun-ed and thirty-two, is signed by A. Parsons, and states that the oney was paid by Mrs. Jane Hunton, executrix of Benjamin Weller, deceased.

Mrs. Hunton, in her examination, says, she does not know

any thing of the settlement of this account; that if she was present at the time she must have forgotten it, and that she has never paid any thing to Mr. Parsons on account of the Lodge. She says, however, that she always knew there was such an account. Mr. Parsons has also been examined on the subject. The testimony of both taken together, shows the fact of the account, the acknowledgment of it by Benjamin Weller in his life time, and its subsequent settlement by Parsons, who was authorized by the Lodge to settle their accounts generally. Parsons expressly states that he has received the amount mentioned in the receipt; and the strong probability is, as the settlement was made after the marriage, that it was made with the husband, and the receipt taken in her name as executrix. This reasonable presumption reconciles the apparent discrepancy which exists, and satisfies me in overruling the exception.

Exception 4. The fourth exception is to sundry allowances made by the master for bad debts, viz.:—

Robert King, - - - -	$35 65
James Brooks, - - - -	20 16
James McGee, - - - -	7 37
James Drummond, - - -	3 69
Adna Allen, - - - -	11 12

As to Robert King, the testimony of John K. Flood is sufficient to show that the amount of the demand against him might have been collected at any time within three years after the death of the testator. If the money was due, and there is nothing to show that it was not, I see no reason why the executors should not be charged with it. King was in business in Paterson—a near neighbor; and if the collection of the money was neglected for the space of three years, and then the debtor failed, the executors should be made to respond for the amount.

James Brooks. It appears from the testimony that he was able to pay; but Mr. Dickerson says in his examination, that he alleged there was nothing due. The executors, in their discretion, have thought right to be satisfied, that there was really no just claim against Brooks, and have therefore made no effort to

collect the amount appraised, or any part of it. There is nothing to show that they acted imprudently, or that the fact is different from what it was represented, and therefore I cannot say they should be charged. The credit should have been under the head of debts not due, and not bad debts. That it was not, is probably the cause of this part of the exception.

The other allowances made by the master are correct. The exception is disallowed as to all except the credit for Robert King's account.

The fifth exception is to an allowance for the sum of thirty-five dollars for two riding-chairs sold to P. S. Vanhouten, on the ground that the money had been lost by the insolvency of the debtor.

In my opinion this exception should be allowed. The property was sold to Vanhouten in eighteen hundred and twenty-seven, some years after the death of the testator. Jane Weller took his note payable to herself individually, and not as executrix, in four months, at the Paterson bank. In July, eighteen hundred and twenty-nine, he was discharged under the insolvent laws of the state.

From the time at which this property was sold, and the manner in which the note was taken, it may fairly be inferred that Mrs. Weller intended to treat the property as her own, and account to the estate for the value of it. But independently of these circumstances, I think she is justly chargeable for neglect in not collecting the money, when, for aught that is made to appear, it might have been collected without difficulty. The note was payable at bank, but there is no evidence that it was ever presented there for payment, or that any steps whatever were ever taken for its recovery. Two years after the making of the note, the maker applied for and obtained his discharge. In my opinion such negligence should charge the executor. It cannot be reconciled with good faith, or the exercise of a sound, reasonable discretion.

Exception 6. The master, in Schedule No. 6, attached to his report, has exhibited a general account of all the assets, real as

well as personal, that have come to the hands of the executrix, Mrs. Hunton, to be administered, and of her payments and disbursements out of the same. According to this account there is a balance in her hands of three hundred and eighty-seven dollars and eighty-three cents. On this balance no interest has been computed by the master, and his omission to charge it forms the ground of the sixth exception.

It does not distinctly appear from the schedule referred to, how long this balance has been in the hands of the executrix. It was said in argument, and not denied, that it has been in hand since eighteen hundred and thirty-one. If this be so, interest should be charged; as there were debts due from the estate, to the payment of which it could and ought to have been applied. It was said in answer to this complaint, that although interest was not charged on the balance, it was charged on the items of which the balance was composed. This does not appear to be the case; at least I am not able to perceive it in the account as stated; and as the account must go back to the master for some correction, I shall direct him to charge interest on the balance during the time it appears to have been in her hands unemployed.

Exception 7. The master has allowed three hundred and three dollars and ninety-seven cents for repairs to the real property, and this also is excepted to.

After the marriage of Mrs. Hunton, in eighteen hundred and twenty-eight, she and her husband became liable to pay rent for the property they occupied belonging to the estate. The master has fixed the annual rent at two hundred and ten dollars, to which no objection appears to be made. The different sums paid for repairs up to eighteen hundred and thirty-three, are specifically set forth in the account; and although the amount is considerable, yet taking into consideration the nature and situation of the property, I am not prepared to say the master has erred.

It was objected by the complainants that a claim for repairs cannot be set off against a demand for rent. This is technically correct, and if this were a suit at law, brought for the recovery of rent under an agreement, the objection would be sustained.

But the object in this court is to make a final settlement and distribution of this whole estate, and with this view, the master was directed, in taking the account, to make to the parties all just allowances. The claim itself being a just and equitable one, I see no reason to dissent from the report of the master upon this point, and shall disallow the exception.

Exception 8. This exception refers to the sum of eight hundred and twenty dollars and twenty-six cents, reported to be due to the Paterson bank; and to the sum of two thousand and seventy-one dollars and sixty-six cents, reported to be due to the executors of doctor William Ellison, deceased.

The debt to the estate of Ellison appears to be a just debt, due on a note given by Weller, the testator, shortly before his death. In making out the amount two errors have been committed. The master, in making the computation, inadvertently, I presume, has in one instance calculated compound interest, by adding a balance of unpaid interest to the principal, and then calculating interest on the whole. Thus, on the thirty-first of March, eighteen hundred and twenty-four, there was a balance due on the note of sixteen hundred and twenty-three dollars and thirty-eight cents. Interest is cast on this to the twenty-eighth July, eighteen hundred and twenty-nine, amounting to six hundred and three dollars and five cents. On that day there was paid three hundred and four dollars and eighty-two cents. This is deducted from the amount of principal and interest then due, and interest is then cast on that balance; which is in truth adding the balance of unpaid interest to the principal, and casting interest on the whole. This cannot be right. Partial payments of interest can never increase the principal of the debt. The true rule, and I believe the practice in all our courts, is this; where partial payments are made, exceeding the interest due, the surplus is to be deducted from the principal, and the balance forms a new principal on which to compute interest; but when the payments do not equal the interest due, no deduction is made, and interest is cast on the principal until the payments exceed the amount of interest, and then such excess is to be deducted from the principal, and

interest is computed on that balance. The same rule is established in New-York: *Connecticut* v. *Jackson*, 1 *John. Chan. R.* 13.

The other error is the allowance to doctor Ellison of a payment made to B. W. Lyon, on the twenty-seventh of February, eighteen hundred and twenty-seven, of eleven dollars and seventy-five cents, with interest to October, eighteen hundred and thirty-four, amounting in the whole to sixteen dollars and seventy-seven cents. This must have been a payment of a claim of Lyon's against the estate. If doctor Ellison paid this as an executor, (although it appears he never proved the will,) he paid it in his own wrong, for this same Lyon was actually a debtor to the estate in just about the same amount, and for that debt the executors have claimed a credit, alleging it to have been a bad debt, and the master has allowed it. It is evident, then, there was really nothing due from the estate; and if doctor Ellison paid this as executor, without inquiry or examination, it cannot be allowed him. If he paid it as an individual, he has no other rights than Lyon had; and the claim of the estate against Lyon is a just offset. In these two particulars the report of the master, as to the Ellison debt, must be corrected.

As to the claim of the Paterson Bank, it is proved by the testimony of Andrew Parsons, formerly the cashier. The whole amount is eight hundred and seventeen dollars and sixty-six cents, of which about three hundred and seventy dollars is for interest, computed to the eleventh of July, eighteen hundred and thirty-three. The exceptants insist that the whole was barred by the statute of limitations, and ought not to have been paid, inasmuch as the payments were from the land which was devised. On inspecting the items of the account, it appears that they are from March thirty-first, eighteen hundred and nineteen, to twentieth of May, eighteen hundred and twenty-two. Benjamin Weller died in eighteen hundred and twenty-three. None of them were barred by the statute at the time of his death. Mr. Parsons states that the account was spoken of to Mr. Dickerson and doctor Ellison shortly after the death of Mr. Weller, and

payment urged: they said they were not in funds, but when they were in funds they would pay the account: and further, that Mr. Dickerson was most frequently spoken to on the subject.

Under this state of facts, I think the allowance by the master is correct. It was a debt due and existing when the testator died, and all his property, real or personal, whether given or devised, constituted a fund for its payment. Demand for payment was made, and payment was promised. All was done in good faith on both sides, and I cannot doubt that the payment was properly made, though out of the proceeds of the lands devised. No rights of the devisees or heirs have been taken away or interfered with by the executors. The land has been ordered to be sold for the payment of the debts of the testator; that is, the debts due from him at the time of his decease. It would be hard equity as against the creditor to say, that because he waited at the solicitation and on the promise of the personal representatives, and did not run either the executors or devisees to expense in collecting a bona fide debt, actually due, he is now to be met by the statute of limitations, and have his debt taken away.

If the claim had been barred by the statute when the testator died, the case would have been different. Both executors and devisees would have had a right to avail themselves of the defence; and it has been held in such cases, that no act or acknowledgment of the personal representatives shall bind the lands in the hands of the devisees: *Mooers* v. *White*, 6 *John. Chan. R.* 360; *Thomas* v. *Peter and Johns, adm'rs, &c.*, 12 *Wheat.* 565. Those cases arose upon very stale claims, and it is unnecessary to discuss the principles laid down by the courts in deciding them. They do not reach this case, though some of the reasoning employed in them may seem to cover it.

The principle contended for in the exception is this, that when debts are due and owing at the time of the testator's death, and no proceedings are had against the heir or devisee within six years from the promise, if it be a simple contract debt, that for default of such proceeding against the heir or devisee, the claim

shall be considered as barred by the statute, and shall not be paid out of the proceeds of the land, where it has been sold for the payment of debts. This I am not prepared to assent to, and shall disallow the exception so far as concerns this point.

The ninth exception is to an allowance made by the master for money due to Ralph Doremus for improvements made by him to the property he leased of Jane Weller before her marriage.

By the will this property was given to the widow to enjoy during widowhood. She leased to Doremus in February, eighteen hundred and twenty-eight, and covenanted to pay for the improvements he might make. By the marriage, her right to the property was forfeited, and went to those legally entitled. She is bound by her covenant to pay Mr. Doremus, and he can have no claim against the estate. He made no contract with the executors, nor is there any liability on their part to pay any thing to him.

If, however, Mrs. Hunton, after paying Doremus, may lawfully recover it from the heirs, it will lead to the same result, and the sum may as well be allowed in the present account. But I do not see that such would be the case. She made the lease in her own name, and caused the improvements to be made on her own responsibility. She treated the property as her own, and my impression is that she can make no claim for remuneration. At all events, the exception is well taken to the account as it now stands.

Let the report be returned to the master, to be corrected, according to the opinion of the court.

Order accordingly.

SAMUEL PAXSON et ux., v. The Administrators of EDWARD W. POTTS, deceased.

That the real and personal estate are united together by the testator in the residuary clause, is not such a blending of them as to constitute one fund, and charge the land with the payment of legacies, except where there was no previous devise of real estate.

The circumstance that the devisees are also executors of the will, is not *of itself* sufficient to charge the land with the payment of legacies.

Where a legacy coupled with a devise of real estate, is given to the widow in lieu of dower, her acceptance of the provision will not create an equity in her favor to charge her legacy on the land against other devisees.

BILL filed March sixteenth, eighteen hundred and thirty-two. The bill states, that John Potts, deceased, was in his life time, and at the time of his death, possessed of a large personal estate, and was also seized and possessed in fee simple of a valuable real estate.

That on the twenty-eighth day of June, A. D. eighteen hundred and twenty-six, the said John Potts made and published his last will and testament, in due form of law to pass real estate, and therein and thereby disposed of his said estate as follows, to wit:—

"*Imprimis.* It is my will that all my just debts and funeral expenses be paid by my executors as soon as conveniently may be after my decease.

"*2d Item.* I give and bequeath to my dearly beloved wife Catharine R. Potts, and to her heirs and assigns for ever, in lieu of her right of dower, and every other claim which she may have against my estate, the following described property and sum of money, to wit: My house and lot, situate on Wood-street, in the town of Burlington, in the state of New-Jersey; also a part of the furniture of the house I now occupy in the city of Trenton, to wit, two feather beds with bedding for the same, two bedsteads and two sets of curtains belonging thereto, three carpets, two looking-glasses, twenty-four chairs, two pair of brass andirons, shovels and tongs, one sideboard, one pair of knife-cases,

one pair of card-tables, one breakfast and one dining table, one sofa, two mahogany bureaus, the whole of the china and glass ware now in use, and the set of plate, together with the full sum of three thousand and five hundred dollars; to be paid by my executors as follows; five hundred dollars thereof six months after my decease, and three thousand dollars eighteen months after that period, to wit, twelve months after the first payment.

"3*d Item.* I give and bequeath, and it is my will that one half part of all money which may accrue to me from the now unsettled estate of my father, Richard Potts, esquire, deceased, be put at interest for the benefit of my sister, Elizabeth Coxe, and that one other moiety thereof be paid to my niece, Rebecca Coxe, to whom also, after the decease of her mother Elizabeth, I give and bequeath the first moiety of the said money, be it more or less.

"4*th Item.* To my two sons, John B. Potts and Edward W. Potts, of the state of Louisiana, and to their heirs and assigns for ever, I do give and bequeath the whole of my real and personal estate, excepting only the portions mentioned in the second and third items of this my will; to be equally divided between them at such time as they or either of them shall think it his or their interest to divide the same."

The testator appointed his two sons, John B. Potts and Edward W. Potts, executors of his said will, and died on the third day of November, A. D. eighteen hundred and twenty-six. John B. Potts, one of the executors, died in August, eighteen hundred and twenty-seven, leaving Edward W. Potts, the other executor surviving; who, on the eighteenth day of November, A. D. eighteen hundred and twenty-six, proved the said will, and took upon himself the execution thereof.

The bill further states, that the said John B. Potts died intestate, leaving the said Edward W. Potts his heir at law, and before any division of the said estate, or any settlement thereof; that by the death of the said John B. Potts, the said Edward W. Potts became also the sole executor of the said will, and took possession of the said estate, and thereby became liable to pay to

the said Catharine R. Potts the legacy of three thousand five hundred dollars, bequeathed to her by the said will.

That on or about the twenty-seventh day of October, A. D. eighteen hundred and thirty, the said Edward W. Potts, as executor as aforesaid, having made to the said Catharine R. Potts several small payments, at different times, on account of her said legacy, gave her a certificate or statement in writing, in the following words, to wit:—"There is now due to Catharine R. Potts, from the estate of John Potts, deceased, two thousand eight hundred and six dollars and fifty cents, being the balance of legacy left by the deceased, and now unpaid—the interest having been paid up to this date. October 29, 1830.

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That the said Edward W. Potts died sometime about the month of May, A. D. eighteen hundred and thirty-one, intestate, and without issue, and without having settled the accounts of his executorship, and without having paid the balance of the said legacy, leaving William Potts, his uncle on his father's side, his heir at law. That the said William Potts and Aaron P. Wright obtained letters of administration of the personal estate of the said Edward W. Potts, and took possession of the same, including the assets in the hands of the said Edward W. Potts at the time of his death, as surviving executor of his father, John Potts, deceased; and that the said William Potts also took possession of all the real estate devised by the will of the said John Potts, deceased, as aforesaid, claiming the same as heir at law to the said Edward W. Potts, deceased.

That on the eighth day of March, A. D. eighteen hundred and thirty-two, the said Catharine R. Potts intermarried with Samuel Paxson, whereby he became entitled in right of his said wife, to have the balance of the said legacy remaining due from the estate of the said John Potts, deceased.

That the said William Potts and Aaron P. Wright, administrators of Edward W. Potts, in the term of October, eighteen hundred and thirty-one, of the orphans' court of the county of Hunterdon, obtained an order of the said court, directing the

said administrators to sell so much of the real estate whereof the said Edward W. Potts died seized, as will be sufficient to pay his debts; by virtue whereof they advertised for sale sundry houses and lots of land, being the residue and remainder of the real estate of the said testator in Trenton, which remained unsold, for the payment of the debts of the said Edward W. Potts, deceased.

The bill prays that an account may be taken of the personal estate and effects of the said John Potts, the testator, and also an account of the funeral expenses, debts and legacies; and that, if necessary, so much of the real estate of the said John Potts, deceased, may be sold, as may be proper and expedient to satisfy to the complainants the amount due them on account of the said legacy; and that the said William Potts and Aaron P. Wright be restrained by injunction from selling any part of the real estate of the said John Potts, deceased, for the payment of the debts of the said Edward W. Potts, deceased, by virtue of or under the said order of the orphans' court of the county of Hunterdon; and that the complainants may have such other or further relief as may seem meet, &c.

An answer was filed by the defendants; but as the opinion of the chancellor rests entirely upon the construction of the will, set out in the bill of complaint, the contents of the answer are not material to a full understanding of the case. The cause was heard upon bill, answer, replication and proofs.

Halsted and *Wall*, for complainants.

H. W. Green and *Southard*, for defendants.

Cases cited for complainants. *Preston on Legacies*, 57; 2 *Atkyns*, 297; *Prec. in Chan.* 397; 1 *Vesey, sen.* 500; 4 *Mad.* 188; *Prec. in Chan.* 430; *Cro. Eliz.* 304, 716, 727; *Cro. Car.* 86; *Brownl.* 74; *Cro. Jac.* 597, 640, 645; 3 *P. W.* 246; 2 *P. W.* 616; 15 *Vesey*, 512; 3 *Atkyns*, 358; *Ram. on Assets*, 42, 43.

Cases cited for defendants. 2 *Vesey*, 328; 2 *P. W.* 188; 3 *Atkyns*, 355; 4 *Mad.* 188; 2 *Sim. and S.* 592; (1 *Con. Eng. Cha. R.* 604;) *Bac. Ab. Extinguishment, D.; Yelv.* 38; 8 *Mod.* 328; *Buller's N. P.* 182; 1 *Bay.* 112; 2 *Dyer*, 140, *a.* 39; 2 *John. R.* 473; 2 *Sch. and Lef.* 450; 10 *John. R.* 30; *Clancey*, 224; *Ram. on Assets*, 57; 3 *Con. Eng. Cha. R.* 427.

THE CHANCELLOR. On the twenty-eighth day of June, eighteen hundred and twenty-six, John Potts, late of the city of Trenton, made his last will and testament, duly executed to pass real estate, and therein gave to his wife Catharine, now one of the complainants, in lieu of her dower, a house and lot in Wood-street, in Burlington city, sundry articles of furniture, and the sum of three thousand five hundred dollars. He then gave to his sister and niece the money that should accrue from the unsettled estate of his father, Richard Potts, deceased; and then added the following clause:—"To my two sons, John B. Potts and Edward W. Potts, of the state of Louisiana, and to their heirs and assigns for ever, I do give and bequeath the whole of my real and personal estate, excepting only the portions mentioned in the second and third items of this my will; to be equally divided between them at such time as they or either of them shall think it his or their interest to divide the same."

John B. Potts and Edward W. Potts were named as executors. John B. Potts died after the decease of his father, without having proved the will, and without being married or having issue—whereby all his interest descended to his brother, Edward W. Potts, who thereby became sole executor, and took possession of all the real and personal estate.

The complainants charge in their bill, that the widow made frequent applications to the said Edward W. Potts for payment of the legacy. That he at one time prepared and offered to give to her his bond to secure the payment of the legacy; that he executed one and gave it to her; that she was not satisfied with it, there being no security, and they agreed to put an end to the

proposed arrangement and entirely to rescind and annul the same, which was accordingly done, and the bond was taken back and cancelled. On the twenty-seventh of October, eighteen hundred and thirty, the said Edward made a calculation of what was due on the legacy, and gave her a certificate in the following words:—"There is now due to Catharine R. Potts, from the estate of John Potts, deceased, two thousand eight hundred and six dollars and fifty cents, being the balance of legacy left by the deceased and now unpaid—the interest having been paid up to this date. October 29, 1830.

$2806 50. E. W. POTTS, Ex'r of John Potts, dec'd."

Which sum or balance of legacy is still unpaid.

In June, eighteen hundred and thirty-one, Edward W. Potts died intestate, and without issue, leaving William Potts, his uncle, his heir at law and next of kin; who, together with Aaron P. Wright, took out letters of administration upon his estate, and of the assets of the estate of John Potts, deceased, and William Potts also took possession of all the real estate, as heir at law.

The bill then charges, that the said real estate is charged with the balance of the legacy due to the widow, who has recently intermarried with Samuel Paxson, the complainant; that a valuable part of the property has recently been sold by the sheriff, under an execution against Edward W. Potts, for his own debt, and not for the debt of his father, at a great under value, and purchased in by the said William Potts; and that the said administrators are now seeking to sell other parts of said real estate, under a pretended order of the orphans' court of the county of Hunterdon, for the payment of the debts of the said Edward W. Potts.

The bill prays an injunction to prevent the sale; also, an account, and that the legacy, or such part of it as may not be paid out of the personal estate, may be decreed to be a charge on the land, and be satisfied thereout.

The answer of the defendants is of great length. It sets up, among other things, that the personal property of the testator

was greatly reduced by bad debts and heavy losses, and was altogether insufficient to pay his just debts, and would have been so under the best management. It alleges, also, that the bond given by Edward W. Potts to Catharine R. Potts, the widow, for the amount due on her legacy, was received by her in full satisfaction and discharge thereof; that payments were made on it on account of interest, and that interest was paid on it up to the first of November, eighteen hundred and twenty-eight; that it was held by the widow nearly three years, and was not delivered up until the twenty-seventh of October, eighteen hundred and thirty, after repeated payments of interest had been made upon it, nor until Edward W. Potts had become greatly indebted and embarrassed in his circumstances, and she had become apprehensive of his insolvency; that the object of doing it at that time was to transfer this debt, now being an individual debt of the said Edward, to the estate of John Potts, deceased, and make the same a charge upon the estate—which they could not lawfully do.

The answer denies that the premises, or any part of them, were sold for an under value. Some of the real estate was sold at sheriff's sale, to satisfy a debt to the Brearleys; but it was a debt of John Potts, which Edward had bound himself to pay, and the property sold for as fair a price as property generally does at sheriff's sale. It admits that an order for sale of the real estate of Edward W. Potts, deceased, was obtained, and they are going on to sale, as the estate of Edward is insolvent, and will not pay his just debts. It insists that the legacy was never a charge upon the land, or if it was, the taking of the bond for the amount due, released it; and that it cannot now be set up as against creditors having lawful liens on the land; but that the complainant must come in with his claim on the same footing as other creditors. The answer then prays, that the injunction may be dissolved, and that the money may be brought into court, to abide its order; and offers to account, &c. under its order.

The whole case rests upon a single point. If the legacy is

not by law a charge on the land, there is an end of the controversy.

Real estate, as was observed by this court in the case of * *Van Winkle* v. *Van Houten et al.* is not naturally or ordinarily the fund out of which legacies are to be paid. They are, as a general rule, to be satisfied out of the personal property. They may, nevertheless, be charged on the land, at the will of the testator. He may charge them on the land and exempt the personal estate. This is not often done, and to effect it there is required an expression of intention so clear as to admit of no reasonable doubt. Or the testator may make the real estate liable for legacies in case his personal property is insufficient to pay them; and this is what is generally meant by charging the land with the payment of legacies. "It may be either by express words or by implication. If by implication, it must be a fair and satisfactory inference that such was the intention of the testator." This intention, the court then held, was to be gathered from the language and dispositions of the will; and these were to be construed, not simply in reference to the particular expressions of the will, but the situation of the property disposed of, and of the persons taking.

In that case, the authorities on the point, and especially the more modern ones, were considered, and the court was of opinion that the decision of the vice-chancellor of England, in the late case of *Parker* v. *Fearnley*, 2 *Sim. and Stu.* 592, (1 *Con. Cha. R.* 604,) in which it was held that the simple expression in the will itself, without reference to any thing else, must govern, was too narrow, and opposed to the whole current of authorities. The decision of the chancellor of New-York in *Lupton* v. *Lupton*, 2 *John. Chan. R.* 614, was also considered. It is there laid down, that the intention of the testator is to be inferred from the language and dispositions of the will. To understand properly the dispositions of a will, which are dependent on the intention of the testator, it is often important to know something of the property devised, or the person to whom it is

* See ante, page 172.

given. The relationship between the testator and the devisee and legatee, may not appear upon the face of the instrument, and yet, according to many cases, the intention of the testator and the construction of the will may depend on it. So the fact that there was really no personal property at all, either for the payment of debts or legacies, may go far to settle the intention of the testator in regard to the fund out of which the legacies were to be paid: *Webb* v. *Webb*, *Barnard. Rep.* 86; 2 *Eq. Ca. Ab.* 504; *Lypet* v. *Carter*, 1 *Vesey, sen.* 499. With this construction, the law, as laid down in the case of *Lupton* v. *Lupton*, was adopted as the rule of this court.

The circumstances under which the courts of equity have considered legacies charged on real estate, are very various; and, in the numerous cases which have occurred, there are some not easy to be reconciled. There are few of those, however, that can apply to the case now under consideration, and it is not deemed necessary to refer to them.

By the will, the lands are not distinctly charged—if chargeable at all, it must be by implication—and the intention of the testator must be gathered from the circumstance that the testator has blended his real and personal estate together, so as to constitute one fund, and, therefore, the legacy must be paid out of that fund: or, from the fact that the devisees are the heirs at law and executors, from which, it is insisted that the testator intended the legacies to be paid, at all events. But I do not consider this case as being within the principle. The real and personal estates are not blended by the testator, so as to constitute one common fund, as in the cases where that principle is recognised. In *Bench* v. *Biles*, 4 *Mad. Rep.* 187, the rule is clearly illustrated. The testator gives to his wife, for her life, all his real and personal estate—blending both together, as one common fund, for her use: He gives certain pecuniary legacies, to be paid after her death, and then the rest, residue and remainder of his real and personal estate, to his nephews. The court then held that the testator had treated all parts of his estate as one fund: that he had blended and amalgamated them together, for

the benefit of his wife; that, out of this fund, after her death, the legacies should be paid, and then, that the residue should go to the nephew. But, in this case, the testator nowhere treats the real and personal estate as one fund. He gives a certain specific part of his real estate to his wife in the first place, then specific portions of his personal estate, and then a pecuniary legacy. He also gives legacies to other relatives, to be paid out of particular funds; and, afterwards, gives all the rest, residue and remainder of his estate, real and personal, excepting those legacies, or portions, (as he calls them) to his two sons. That they are united together in the residuary clause, is not sufficient—especially when parts of the real as well as personal estate have been previously given. Such a construction would overturn settled principles and introduce great confusion in this branch of the law. There are cases where a residuary clause of that kind has been held sufficient to charge lands with the payment of legacies; but they go upon the principle that there were no previous devises of the real estate, and that, when the testator gave the residue of the real estate, without having devised any part of it previously, he must have meant the residue after paying the legacies—otherwise, it could not be a residue. The case before me is of a different character, and cannot, by any construction, be brought within that rule.

If the real estate is to be charged, it must be from the circumstance that the devisees are the heirs at law and executors.

There is a class of cases that appear to sustain this principle, and they are entitled to respectful consideration; but, on examination, it will be found that most of them have some other peculiarity, and that, in some of them, the decision has been placed partly on other grounds.

The case of *Alcock* v. *Sparhawk*, in 2 *Vern.* 228, (Raithby's edit.) is one of the oldest. The testator devised his lands to his brother, who was his heir, in fee; gave sundry legacies; and made his brother executor, desiring him to see the will performed, according to the trust and confidence reposed in him. The court held the land charged with the legacies, on two grounds.

The first was, that as the devisee was his heir at law, the testator needed not to have devised the lands, unless he intended to subject them to the payment of the legacies. The second was, that the devisee was also executor, and *was desired to see the will performed*, and upon this the court laid stress. It differs, therefore, in some respects, from the case now before the court. There was also parol evidence admitted, to show that the devisee had agreed to the payment of those legacies when the will was made, but it does not appear that any notice was taken of it by the court.

In *Tompkins* v. *Tompkins*, *Finch's Rep.* 397, the devisee was one of the executors; but there the testator devised the lands to his son, after the payment of debts and legacies—and the court held that it amounted to a charge on the land, since the son, by the will, was not to have the lands till after the debts and legacies were paid. The peculiar distinction in that will is not to be found in the one now under consideration.

The same phraseology is used in *Brudenell* v. *Boughton*, 2 *Atk.* 268; and the devisee was made executor. The court held the land charged.

In *Lypet* v. *Carter*, 1 *Ves. sen.* 499, the devisee was made executor, and the land was considered charged. The court, however, did not appear to place it on that ground, but said that, on the whole case, it seemed to be the testator's intent to provide effectually for every branch of his family; and if that construction did not prevail, his daughter Susan was to go without a provision.

Besides these, there is an American case, not cited at the bar, which favors the doctrine advocated by the complainant. I refer to *Nichols* v. *Postlethwaite*, 2 *Dall.* 131. The testator bequeathed several pecuniary legacies to different persons, and "all the rest and residue of his estate, real and personal," he gave to his son, whom he appointed executor. The court was very clear, that it was a charge on the lands, and that nothing was given to the residuary devisee but what remained after the payment of the legacies. There are two points in that case distinguishing it from

the present one. The one, that without having devised previously any part of his real estate, he gave the *residue* of it to this devisee. There is a class of cases in which it is considered that such a disposition implies that part of the real estate may be applied to the payment of legacies, or else the term *residue* is without meaning. The other point is, that it appeared the testator had no personal estate whatever. How far these two matters may have influenced the court, cannot be ascertained.

From this review of the cases, it will be seen that the rule is not so firmly established as to render it of very binding authority. There is not a series of decisions distinctly upon the point; and, as was remarked by this court, in *Van Winkle* v. *Van Houten*, before referred to, the late case of *Parker* and *Fearnley*, 1 *Cond. Eq. Rep.* 604, has somewhat shaken this rule. The vice chancellor expressly says, he cannot infer that the legacies are to be charged on the land, because the testatrix has directed them to be paid by the executor, he being also the devisee. He considered it a clear case against the claimant.

Under these circumstances, I feel free to take such course as would rightfully be taken if the executors were strangers. I do not consider the fact that the executors and devisees are the same, as sufficient, of itself, to charge the land. It is entitled to some consideration, especially when connected with other facts tending to show the intention of the testator; notwithstanding, by itself, it would be unsafe to rest upon it. The great principle that legacies are to be paid out of the personal estate, and that the realty is not to be charged except where the intention of the testator is clear, would be violated. It is wise to adhere to this rule, and not guess at intentions, for the purpose of carrying out a supposed equity.

There is one other feature in this case which deserves to be noticed. All that was given by the testator to his widow, was in lieu of dower; and, having accepted the bounty, it is supposed she has an additional equity on that ground. When a provision is made, by will, for a wife, and it is given in lieu of dower, she is not bound to accept. If there be a devise of lands, as in this

case, she has six months to determine whether to take the bounty of the husband or the dower at law. She has accepted the provision of the will; and, although part of it may fail, this court cannot say that the residue, consisting of the house and lot in Burlington, is not equal in value to her dower at common law in the whole premises of which her husband died seized. It may be that the provision for the wife was much more valuable than the dower; and, if so, there could be no possible equity in charging it on the land against the devisee. He might be compelled to pay, in this way, double the value of the dower.

The court has no means of knowing or ascertaining the relative value of the dower and the property given in lieu of it; and, on so grave a subject, it would be unsafe to found an equity on mere conjecture, and carry it out to the great injury of third persons.

Upon the whole case, I am satisfied to decree that the pecuniary legacy to the wife is not a charge upon the land devised; and, therefore, that the injunction heretofore granted be dissolved.

Order accordingly.

PETER C. WESTERVELT and JACOB BRINKERHOOF, Executors of LEAH LOZIER, deceased, v. WILLIAM A. ACKERMAN and JANE his wife, and JACOB C. TERHUNE and DAVID L. VAN SAUN, Administrators of JOHN L. VAN SAUN, deceased.

The complainant, in a bill of interpleader, sets out the claims as exhibited to him, and he cannot be expected to do it with as much particularity as the complainants themselves might do. It is enough for him to satisfy the court that there are opposing claims, against which he is in equity entitled to protection until they are settled, so that he may pay with safety.

A bill of interpleader may be filed, although the claim of one of the claimants is actionable at law, and that of the other in equity.

It seems that a bill of interpleader will be sustained in cases where it is not absolutely necessary that the complainant should resort to equity for protection.

[Ex'rs of Lozier v. Adm'rs of Van Saun.]

It is no cause of demurrer to a bill of interpleader, filed by executors, that the bill prays relief, on the ground that the estate is likely to prove insolvent.

The fact that the particular amount due is not ascertained, does not take from the executors the character of indifferent stakeholders.

Nor is it a cause of demurrer to a bill of interpleader, that it is filed after judgment at law, no defence having been made against the recovery of judgment, where the whole or a part of the defence is equitable only.

By delaying to file his bill until after judgment, the complainant subjects himself to the burthen of bringing the money into court, but is not deprived of his right.

The bill of interpleader is not a proper remedy when the complainant has any personal interest in the question to be settled.

BILL OF INTERPLEADER. The cause came on for hearing, upon a demurrer filed by the defendants to the complainants' bill. The character of the bill and the grounds of demurrer are fully stated in the opinion of the chancellor.

E. Vanarsdale, for defendants, in support of the demurrer. He cited 5 *Mad.* 47; 4 *John. C. R.* 468; 20 *John. R.* 229; 3 *Term R.* 125; 4 *Wash. C. C. R.* 507; 1 *Eng. Con. Cha. R.* 347; 1 *Sim.* and *Stu.* 63; 1 *John. C. R.* 320, 465, 49, 91, 98; 2 *Ibid.* 230; 3 *Vesey*, 371; 5 *John. R.* 101; *Douglass*, 170.

I. H. Williamson, contra.

THE CHANCELLOR. The facts of the case are briefly these. One Leah Lozier, of the county of Bergen, being seized and possessed of real and personal estate, made her will in January, 1824. By her will, she gave one-third of her estate to her daughter, Ann Brinkerhoof, and the residue, as well real as personal, she gave to her executors, in trust, to sell and dispose of the same; and the one-half of the moneys arising from the sale of the real estate, and the one-third of all other moneys which the executors should receive, she directed to be placed out on security, and the interest accruing therefrom to be paid, from time to time, to Jane Ackerman, wife of William A. Ackerman, (said Jane being the daughter of testatrix,) with such part of the principal as the executors should

deem necessary for the support of the said Jane Ackerman and her children and grand children; and, during the life of said Jane, to be paid to her, on her receipt, and not to be in any way subject to the order or the debts of her said husband.

Leah Lozier died in March, 1833, leaving her said will unrevoked. After making the will, the testatrix sold the greater part of the real estate of which she was seized when she made her will—so that there was none for the executors to sell, after her death; and the bill charges that she divided the money among her children or put the same out to interest for their use, in such manner and proportions as she thought right. To some of her daughters, she gave her own note for such portion, or part of such portion, as she considered they were entitled to; and, in the case of her said daughter Jane, wife of the said William A. Ackerman, she gave to one Andrew Bush, the son-in-law of William and Jane Ackerman, her note for nine hundred and fifty dollars; it being given, as the said William and Jane allege, in accordance with the intention manifested in the will, for the use of the said Jane Ackerman, and that the same might not be under the control of her said husband. Three hundred and forty dollars were paid on that note, in the life time of the testatrix, leaving due six hundred and ten dollars from the estate.

The bill further charges that Leah Lozier, the testatrix, before her death, gave another note, for three hundred and fifty dollars, to her said daughter Jane, payable to her or her order on the death of the said Leah Lozier, which is unpaid: That the said Jane Ackerman insists that these notes were given for moneys arising from the sale of certain real estate belonging in part to the said Jane, and in which she released her interest to her mother; and that the notes were so drawn with the view of carrying out the intention of the mother, that the said Jane, the daughter, should enjoy the money free from the control of her husband; and the said Jane Ackerman insists that the money due on the two notes, belongs, of right, to her, and that such was the intention of her mother at the time, more especially as part of the property sold belonged to her.

The bill then charges, that in the month of April, 1833, the administrators of John L. Van Saun, deceased, sued out of the inferior court of common pleas of Bergen, an attachment against William A. Ackerman, for three hundred dollars; by virtue of which, the sheriff attached all the right and interest of said Ackerman to any money due to him from the complainants, as executors of the said Leah Lozier, on the two notes aforesaid, given by Leah Lozier, the one to Andrew Bush, and the other to Jane Ackerman: that the plaintiffs in attachment have obtained judgment against Ackerman, and issued a *scire facias* against the complainants, as executors as aforesaid, and have given notice of executing a writ of inquiry, and claim the money due on the said two notes, as belonging to the said William A. Ackerman.

It is further charged that the estate is likely to prove insolvent; in which case, part of the said two notes must be left unpaid.

The complainants, making offer to pay the amount due on the said notes, and alleging their inability to decide between the different claimants, pray the decision of the court, and that the parties may interplead, &c., and that an injunction issue to stay proceedings at law.

To this bill, the administrators of Van Saun, the attaching creditors, have demurred, on several grounds. It is objected that the facts do not present a proper case for a bill of interpleader: that there is no equity in the claims of Jane Ackerman, as exhibited by the bill.

The allegation is, that Jane Ackerman has a separate interest in the notes in question, arising partly from the fact that the trust declared in the will for her benefit was transferred, or intended to be transferred to those notes by Leah Lozier—they coming in lieu of the land which was given in trust; and partly from the other fact alleged, that a portion of the consideration of the notes was for money arising from the sale of real estate in which she had an interest—the same having been released to her mother, with the view of securing the money to her separate use. To this is to be added the allegation that the one note was given payable to Jane Ackerman, or her order, after the death of

her mother, and the other one was payable to a third person, in trust for her benefit.

Taking these facts to be true, as I must do upon this demurrer, I am not prepared to say that here is no equity on the part of Jane Ackerman; and that her claim is so entirely groundless as that an interpleading bill cannot be sustained. The claim is not set forth in the bill with as much accuracy and particularity as could have been desired; but it must be recollected that the party who files the bill of interpleader is not a claimant. He only sets out the claim, as exhibited or made to him, and cannot be supposed to do it with as much accuracy as the claimants themselves would do. It is enough for him to satisfy the court that there are opposing claims, against which he is, in equity, entitled to protection until they are settled, so that he can pay with safety.

The practice of the court has been liberal in favor of persons standing in the situation of stakeholders or agents, having no interest in the property claimed, and only desiring honestly to pay it where it is justly due. It has proceeded on the principle that they have a right to protection, not from being compelled to pay, but from the vexation attending all the suits that may possibly be instituted against them: *Angell* v. *Hadden*, 15 *Ves.* 246; *Langston* v. *Boylston*, 2 *Ves.* 109. Such a bill may be filed, although the claim of one of the defendants is actionable at law, and that of the other of equitable cognizance: *Richards* v. *Salter*, 6 *John. C. R.* 446. And it is said by *Ld. Rosslyn*, in the case of *Langston* v. *Boylston*, just cited, that a claim is a ground of interpleader.

It is contended, however, that the aid of this court ought not to be invoked, except in cases of absolute necessity; and the case of *Bedell* v. *Hoffman*, in 2 *Paige*, 199, appears to favor that idea. The principle there adopted is, that a bill of interpleader should not be filed when the complainant can, in any other way, be protected from an unjust litigation in which he has no interest. Admitting this to be correct, I am not sure that the complainants in this case can be fully protected in any other way. They cannot be protected, in any degree, unless the recovery against them,

as garnishees, will be a good defence for them at all times and in all cases. Generally speaking, such recovery is a defence against the debtors and other persons claiming under or through him. But whether it would be so in the case of equitable claims of third persons, of which the garnishee had notice, and took no measures to have them investigated and adjusted, when he might have done it without difficulty, may raise a question; and he might, at all events, be subject to a vexatious litigation. But I am of opinion that the rule, as adopted in New-York, will be found to be too broad; and I think it will be found that the bill of interpleader has been sustained in many cases on other grounds than those of absolute necessity. In *Langston* v. *Boylston*, above referred to, the chancellor held the complainant entitled to relief on a bill of interpleader, though he need not have come into equity. In that case, there was an action by one party and attachments by another. It was insisted that complainant might defend himself against the attachments, or not. If he did, there was an end of the claim of the creditors who sued under the attachments; if not, and if the goods are condemned, then there is a defence against the other action. The court said, that was precisely the situation in which the plaintiff ought not to be placed. Besides, the complainants in this case are executors, and this court has always been liberal in extending to executors, when acting in good faith, counsel, indemnity and protection.

For these reasons, I shall overrule this ground of demurrer.

2. Another ground of demurrer is, that the bill not only seeks that the claimants may interplead, but prays relief on the ground that the estate is likely to prove insolvent.

I do not perceive that this presents any serious difficulty. There is no dispute as to the amount of the notes themselves. But the executors are not bound to pay the whole to either party, if the assets of the estate will not warrant it. The amount to be paid must be ascertained somewhere. It is not to be done by this court in this suit—such is not the object of the suit. This court will merely decide on the right of the opposing claimants to such

sum as may be payable, leaving that sum to be ascertained in some proper way.

The fact that the particular amount due may not be ascertained, does not take away the character of the executors as indifferent stakeholders. They have no personal interest in this matter to be settled; if they had, the bill of interpleader would not be the proper remedy. But they seek protection; and I cannot believe that when executors come rightfully into this court to obtain its judgment upon conflicting claims, made before the estate can possibly be collected and settled, that they must, by that very act, necessarily be bound for the solvency of the estate; or, in other words, that they shall not be protected unless they will agree to pay the whole amount, whether they have assets or not. This would be almost a reproach to the administration of justice. I can have no doubt of the power of the court so to regulate this case, which is certainly a peculiar one, as to secure the rights of all the parties.

This differs from the case of *Mitchell* v. *Hayne*, cited at the bar, from 2 *S. and S.* 63; 1 *Cond. Ch. Rep.* 347. There the complainant, who was a stakeholder, offered to pay into court the amount in his hands, deducting the duty and commission, which he estimated at a sum certain. The right to this deduction was disputed; and, therefore, the vice chancellor said there was a personal question between the complainant and one of the defendants. He was not an indifferent stakeholder. But, in this case, neither party claims, or can claim, by law, more than is due from the estate. Whether this be more or less is entirely indifferent to the complainants. They have no personal interest in the question.

Another cause of demurrer is, that the bill is filed after judgment; and that, having made no defence against the judgment, the executors are not entitled to relief here.

The matters of defence against the claim, under the attachment, taken together, are rather equitable than legal. A defence might probably have been made to part; but I think it would have involved matters of equity, which could not well have been

disposed of in a court of law. As to the other part, (the note given by testatrix to her daughter,) the defence must have been equitable entirely, and entitles the parties to come into this court for relief. By the delay until after judgment, they subject themselves to the burthen of bringing the money into court, but their rights are not taken away.

Upon the whole case, I am of opinion that the demurrer be overruled, and the administrators be put to their answer.

Demurrer overruled.

Cornelius Doremus v. The Minister, Elders and Deacons of the Dutch Reformed Church in the English Neighborhood.

In the Reformed Dutch Church, under the statute of New Jersey, incorporating religious societies, the civil office of trustee grows out of the ecclesiastical office of minister, elder, or deacon. Every minister, elder, or deacon, properly called and instituted, is, *virtute officii*, a trustee, and must necessarily remain such as long as his ecclesiastical office continues.

Ministers, elders, or deacons, lawfully elected and ordained, and thus inducted into office, though they afterwards secede, renounce the authority of the classis and general synod, and unite with another ecclesiastical body, do not thereby divest themselves of their offices.

There must be a removal or amotion, by a competent power, to determine an office.

If there be a resignation, the resignation must be accepted; and if there be an absolute vacation of an office, such vacation must be recognised and acknowledged.

When the original title of an office is sufficient, though good cause of amotion be shown, even in a case where the charter declares that for such cause of amotion the officer shall vacate his office, the office is not determined until there be an amotion.

When persons are officers *de facto*, they are in *colore officii*, and their acts will be valid until they are lawfully ousted; and more especially as they respect third persons, their acts are binding on the corporation.

[Doremus v. The Dutch Reformed Church.]

In a court of equity the proper tribunal in which to try the question of forfeiture of office? *Quere.*

BILL for foreclosure and sale of mortgaged premises. The mortgage bears date on the second day of February, eighteen hundred and twenty-four, and was executed to the complainant by certain persons styling themselves the minister, elders and deacons of the Dutch Reformed Church of the English Neighborhood, in the county of Bergen, under a seal purporting to be the corporate seal of said corporation, to secure the payment of a bond bearing even date, and conditioned for the payment of two hundred dollars, with interest from the first of May, eighteen hundred and twenty-four.

The defendants, (the individuals by whom the bond and mortgage were given having been removed from office,) by their answer, deny the existence of the mortgage debt. They also deny the execution of the bond and mortgage under the corporate seal, and allege that if there be such bond and mortgage, they were not given by the corporation, but by certain persons claiming to be the corporation, but who, in fact, had seceded from the church and dissolved their connection with the classis of Bergen and with the general synod of the Dutch Reformed Church, and thereby had ceased to be officers and to have authority to make contracts or bind the corporation: That the fact was known to the complainant, who was himself one of the seceders. The defendants, also, in their answer, allege that the bond and mortgage were given through fraud and collusion, for the purpose of compelling the payment of money not actually due, or of obtaining a title to the property covered by the mortgage. A replication having been filed, testimony was taken by both parties, and the cause was heard upon the pleadings and proofs.

Mr. Vanarsdale, for the complainant.

The answer denies the existence of the debt. It denies the execution of the bond and mortgage; and then insists that, if

there is such bond and mortgage, they were not given by the true corporation, and were made through collusion and fraud.

First. As to the execution of the instruments: They are both under the seal of the corporation—proved by Van Saun and Demarest.

The book of minutes contains an order of the corporation for the execution of the bond and mortgage. The entry is on the twenty-ninth of August, eighteen hundred and twenty-three. The papers were executed on the second of February, eighteen hundred and twenty-four, by order of the corporation.

A corporation seal being affixed to an instrument, is *prima facie* evidence that it was properly done. The objecting party must show the contrary: *Ang. and Ames*, 115; 1 *Kyd.* 268; 6 *Serg. and Rawle*, 12; 3 *Hals.* 183; 7 *Serg. and Rawle*, 530; 1 *Ves. and B.* 226.

The formal execution of the bond and mortgage are fully proved.

Second. The great objection is, that the individuals by whom the bond and mortgage were given, have seceded from the church; and, therefore, the instruments are not valid.

They *agreed* to secede in January. It is nothing more than saying they *would separate*—that is, of itself, no separation. Such an act may lay the foundation for a dismission or sentence against them; but they remained elders and deacons until the sentence was passed. There were none others—they were in *colore officii*. The passing of the vote to secede did not turn them out of office: *Ang. and Ames*, 73; *Slee* v. *Bloom*, 5 *John. C. R.* 377.

This is an attempt to get the decision of the court collaterally, as to their right to office, instead of bringing up the question directly. This cannot be done: *Silver Lake Bank* v. *North*, 4 *John. C. R.* 373.

Non-residence is a forfeiture of office; but it must be declared so by the corporation itself. It must avail itself of the law. The court of chancery will not declare a forfeiture: 2 *T. R.* 772.

In a *quo warranto* against an officer, the right of an elector

cannot be tried. That is a separate question, and there is another mode of trying it: *Cowper*, 507.

The consistory remained officers *de facto*, and an officer *de facto* is sufficient for the public.

The office is not determined until *amotion*, and that amotion is by the corporation: *Ang. and Ames*, 487; 2 *Stra.* 819; *Sayre*, 248; *Kenyon's Cas.* 26; 5 *Bro. P. C.* 299; 2 *T. R.* 776.

This is a sound doctrine. The court is required to say that the individuals by whom the bond and mortgage were given, were not legally in office. The answer is, we find them in office; we take them to be rightly there, and cannot examine into that matter in a collateral way.

Whether they are rightfully in office must depend on the judgment of the ecclesiastical tribunals. The court may decide one way, and they may decide another, and then there is a conflict. It is not the spirit of this court to invade the jurisdiction of other courts.

It is proved that those persons were the minister, elders and deacons, *de facto*, of that church: *Ang. and Ames*, 158; *Andrews' Rep.* 163.

This proposition would be sufficient, if we were driven to depend on it; but we are not. We have stronger ground. The individuals by whom the bond and mortgage were given, were duly elected to office. The classis of Bergen convened almost a fortnight after the execution of the bond and mortgage. Charges were preferred against the minister, &c., before the classis. Classis dissolved the connection between the minister and the congregation on the eighteenth of February, eighteen hundred and twenty-four. Up to that time, he was considered as the minister of the church. The defendants ask the court to decide that these men were dismissed a fortnight before. There will then be two judgments in this matter. The sentence deposing them, recognise them as actual officers up to that period. There were no others.

We find that the classis reviewed and reversed their own decision as to two of the consistory deposed, and gave them notice that they might be heard. They were then in their offices. This

reversal took place in April, eighteen hundred and twenty-four, at a regular meeting. In May following, Mr. Banta, who had been deposed, and was restored, was duly notified to attend a meeting of the consistory of the church of English Neighborhood. He was thus treated and recognised by the new consistory as a member. There were but six elders and deacons chosen—Banta and Lydecker, of the old consistory, making the eight—the whole number.

It is a well settled principle in equity, that though formalities may be wanting, just contracts must be abided by: 3 *Atkyns*, 478; 2 *Atkyns*, 45.

The corporation is bound, if the property came to the use of the corporation: *Kyd on Cor.* 314.

This money was applied to the building of a lecture room and school house. These were proper objects. The church so concluded. The complainant made a present of the ground. The debt was for building the school house—not for the lot. The church enjoys the house to this day, as a school house and lecture room.

In the next place, the defendants, by their answer, insist that they do not owe the money. On this subject, the corporation, which is an ecclesiastical one, should have been careful.

The testimony of C. T. Demarest gives the whole history of the subject. The account is produced; the consistory agreed to the account, and said it was right. They settled at two hundred dollars, and agreed to give bond and mortgage. The money has been actually paid out of the pocket of the complainant, on the faith of the promise of this corporation to repay it.

It was agreed, before any act of secession, that when Doremus made the deed and paid the money, he was to have the bond and mortgage. It was not a sudden thing, in the nature of a contrivance.

With the mass of evidence produced, the court must be satisfied that the claim is just—it being for the school house now used and occupied by the church or congregation.

What, then, is to become of the answer of the corporation?

What would such an answer be in case of an individual? It would ruin it, and the answer would be good for nothing. The answer to the principal allegation is unqualified, and is not true. They deny that they owe the debt, or any part of it. They charge design to defraud the church out of its property. There is no pretence for it, in any way. The defendants are actually enjoying the benefit of this property. The complainant is a benefactor of the church; he asks here for the payment of an honest debt, and he is denied his just rights.

Mr. Williamson, for the defendants.

The amount is small, but the principles involved may be of great importance to religious incorporations in our state.

It is alleged that the church is seeking to avoid the payment of an honest debt. This is a begging of the very point in dispute. I shall show that the debt is not just or honest.

1st. Are the bond and mortgage to be considered as corporate instruments?

We deny that they are corporate instruments, so far as the defendants know and believe. Is there any evidence that these are corporate instruments? To make them such, it must be shown that the seal was attached to them by some person authorised to do it, and for the purpose of giving effect to it, as a corporate instrument.

The paper is signed by them as individuals; they say they have set *their* hands and seal—not the common or corporate seal. It does not, on the face of it, purport to be a corporate seal. Can they, then, call witnesses to prove it? Can this be considered as *prima facie* evidence of the common seal?

But, do they prove the fact that this is the common seal? We think not. It is not sufficient to prove that they were elders and deacons—though even that is not shown, but by their acts. It must be shown that some *one* was authorised to affix the seal—it cannot be done by all. A witness cannot properly prove the *regularity* of the execution—it is a conclusion of law.

[Doremus v. The Dutch Reformed Church.]

But the main point for which I contend is, that the persons who executed this bond and mortgage were not trustees of the church when the bond and mortgage were executed. They had divested themselves of their authority, by the secession of the twenty-ninth of January, and of the second of February, eighteen hundred and twenty-four—both of which were previous to the mortgage.

It appears that this church was incorporated in eighteen hundred and nine. They were a component part of the classis of Bergen, which was subordinate to the general synod. A schism took place. There grew up a true Reformed Dutch Church, with a separate government. This took place before January, eighteen hundred and twenty-four. At that time, this minister and consistory resolved to change their allegiance, and become members of a new body; and they denounced the church, declared the connexion absolutely dissolved, and took measures to connect themselves with the other church. They acknowledged themselves to be subordinate to the *true* Reformed Dutch Church. If they ceased to be members of the church, they could not be officers. Could they be continued members of the church against their will?

They were actually accepted and received by the new church, before the execution of the bond and mortgage. They appointed a committee to wait on Dr. Frœligh; and on the second of February, eighteen hundred and twenty-four, he met with the consistory—and commissioners were present from the True Reformed Dutch Church. They were formally received by Dr. Frœligh, who gave them the right hand of fellowship. All this was done before the execution of the bond and mortgage.

What was the legal effect of this separation and secession? Were they members of both churches? Could they become members of the new church, and yet be members of the old? Our law is founded on religious toleration: A man cannot be kept a member of any religious society without his own consent. A contrary doctrine cannot obtain in New-Jersey—it is opposed

to universal opinion. There is no law in the Reformed Dutch Church of that effect.

If these men had a right to choose their own religious society, and to withdraw, did they not do it?—Did they not exercise the right?

The great principle decided in the case of *Hendrickson* v. *Decow*, *Saxton*, 577, was, that the law exercises no restraint over a man's conscience. The chief justice did not think it was necessary to deal with them in order to cut them off. What right have these persons, who have thus separated themselves, to call themselves members of the old church? When did the connexion cease? And especially as to those who have not been dealt with—how do they stand?

Two things are necessary to church membership—faith, and submission to the government and discipline of the church: *7 Hals.* 214. If individuals refuse to submit to the government, they are no longer members of the church. It has been contended that this court has no jurisdiction to decide this question in a collateral way. The court must decide whether those persons were legally trustees—it is necessary, to decide the right of property.

If a man by his own act ceases to be a member, he can never set up that he is an officer of the church. This court cannot try a question of forfeiture; but the question is here, whether they have not ceased to be officers and members of a certain religious community. There are many instances in which this court will take jurisdiction of matters, in a collateral way, where it cannot reach them directly.

These persons, disdaining the authority and jurisdiction of the church to which they were attached, cannot undertake to dispose of the property of that church.

It is said they are officers *de facto*, and must be considered as acting legally, so far as third persons are concerned. The case is not within that principle. Here is no dispute as to the regularity of the election; but they deny that they are any longer under the authority or jurisdiction of the classis or synod, or of the church

to which they originally belonged. They have renounced it. My great principle is, that a man by becoming a member of one church, ceases to be a member of any other—he cannot be a member of both; and that, in this country, a man may attach himself to any denomination he pleases.

In the second place, I contend that there is no evidence of any just consideration for the bond and mortgage, and that it was fraudulent in its inception and completion.

The persons who executed the bond and mortgage, had separated from the church; they made themselves judges in their own case, and undertook to exercise power over the property of other persons.

Three items composed the bond and mortgage, viz.: 1. The account of Doremus himself. 2. The demand of Demarest, the president of the consistory. 3. The demand of Westervelt.

1. As to complainant's own account—there is no evidence that it is just and fair. There is no evidence that it was ever exhibited or presented to the church. It was never brought forward until they actually separated—then we first hear of it. Here are the books; but they say the consistory allowed it. Why, these are the very people we complain of. They ought not to be judges. The account is not proved, and there is no evidence to prove it.

2. As to the demand of Demarest—he brings forward a note, dated in May, eighteen hundred and twenty, and a receipt of Westervelt. The receipt proves that the money paid was not out of the church funds, and was paid by the consistory. No voucher was taken to show that the money was paid by him individually. The entry of the twenty-fourth of May, eighteen hundred and twenty-three, shows the state of the pecuniary affairs of the church. *It was then stated that every debt was paid, and that there was money over.* Was not this debt a church debt? If not, then why did the church undertake to pay it? What then becomes of the fairness and honesty of this debt or claim?

But we are told that this corporation have had the benefit of the contract. It is true—and they have paid for it. Why did

the complainant assume this debt? He never would have done it, if he had not been about to leave the church. It was a piece of management.

THE CHANCELLOR. On the second day of February, eighteen hundred and twenty-four, Cornelius T. Demarest, James Lydecker, Peter Banta, Jacob T. Moore, John W. Banta, John Edsall, Frederick Devoe, David Westervelt, and Bradley Randall, styling themselves the minister, elders and deacons of the Reformed Dutch Church of the English Neighborhood, in the county of Bergen, executed to the complainant, under a seal purporting to be the corporate seal of said corporation, a bond and mortgage for the payment of the sum of two hundred dollars, with interest; and the present suit is brought for the recovery of this amount, now due.

The defendants, in their answer, deny the debt, and also the execution of the instruments under their common seal, and allege that if there be such bond and mortgage, they were not given by the corporation, but by certain persons claiming to be the corporation, but who, in fact, had seceded from the church, and dissolved their connexion with the classis of Bergen and the general synod of the Reformed Dutch Church, and thereby ceased to be officers and to have authority to make contracts and bind the church; that this fact was known to the complainant, who was himself one of the seceders; and that the bond and mortgage were given through fraud and collusion, for the purpose of compelling the payment of money not actually due, or of obtaining a title to the property covered by the mortgage.

A replication has been put in by the complainant, and testimony has been taken on both sides.

On looking into the evidence, I think it sufficiently proved that the debt was due to the complainant. Some little time before, a house had been built by the congregation, at New Durham, for a school house and place of worship. It was near to the residence of Mr. Doremus, the complainant, who had given the ground. Mr. Demarest acted as one of the committee to superintend the

building of the house, and Peter Westervelt, jr., was the builder. At the time the bond and mortgage were given, it appears there was due to Westervelt a balance of fifty dollars; to Cornelius T. Demarest, for money advanced by him to Westervelt, eighty-one dollars and twenty-five cents, and four dollars and eighty-six cents interest; and to the complainant, for boarding of hands and work and labor done, sixty dollars, and three dollars and sixty cents interest—making in the whole one hundred and ninety-nine dollars and seventy-one cents; to which the sum of twenty-nine cents was added, to make up the amount of two hundred dollars. The complainant agreed to assume and pay the debts to Westervelt and Demarest, provided the consistory would give him a bond and mortgage for the whole, including his own account; and this was agreed to and done; and I see nothing in the evidence to induce the belief that the claim is in any degree fictitious or unjust. The present defendants are now in possession of this house, and peaceably enjoy the benefit of it.

I am further of opinion that the due and proper execution of the instruments are sufficiently proved. They are executed by the minister, elders and deacons of the church, constituting the corporation, and under the corporate seal, and in pursuance of a resolution adopted by and entered on the minutes of the corporation; and this is sufficient, as between these parties, for the purposes of the present suit.

The only serious difficulty in this case grows out of a question which has been raised as to the legal right and power of the grantors to execute the papers and bind the property of the church.

To a correct understanding of this question, it is necessary to premise, that, prior to the execution of the bond and mortgage, the persons executing them were severally members of the Protestant Reformed Dutch Church. Cornelius T. Demarest had been, some years before, called by the congregation at the English Neighborhood, as their minister, and had been duly installed into his sacred office by the classis of Bergen, according to the rules and orders then existing and established for the government

of the church; and, according to the same rules and orders, the persons professing to be the elders and deacons of said church, had been regularly chosen and ordained to their respective offices, and were afterwards duly sworn, according to the requirements of the law. As a corporation, under the name of The Minister, Elders and Deacons of the Dutch Reformed Church at the English Neighborhood, they were, according to the constitution of the church and the law of the state sanctioning said constitution, authorised to take charge of and manage all the temporal or secular affairs of the church and congregation. *Prima facie*, then, the acts of the consistory, that is to say, of the minister, elders and deacons of the church, who constituted the corporation, were valid and binding on the church and people whom they represented, and upon their successors in office.

It appears that about the time the transactions in question took place, difficulties had arisen in some parts of the Reformed Dutch Church, in the states of New-York and New-Jersey, by reason whereof, some members seceded and separated themselves from the church, denounced it as corrupt, disdained its authority and jurisdiction over them, and united themselves together to constitute what they denominated the true Reformed Dutch Church. Among those thus seceding, were the grantors of this mortgage—that is to say, Mr. Demarest the minister, and the elders and deacons of the church at the English Neighborhood.

The bond and mortgage bear date on the second day of February, eighteen hundred and twenty-four.

On the twenty-ninth of January preceding, the consistory held a meeting, at which all the members were present, except Jacob T. Moore. At this meeting, the proceedings of a meeting of sundry heads of families of the congregation were read; and it appeared that a large majority of those convened had advised a separation of their connexion with the classis of Bergen: whereupon, the following declaration and resolutions were made and entered into by the consistory, and recorded on their minutes, viz.:

"Now, therefore, for the truth's sake and for conscience's sake,

we, the minister, elders and deacons of the Reformed Dutch Church of the English Neighborhood, do resolve,

"1st. That our connexion with the classis of Bergen and with the general synod, be and hereby is dissolved.

"2d. That we are and design to remain what we always have been, a true Reformed Dutch Church, adhering steadfastly to the constitution of the Reformed Dutch Church, and to the word of God, upon which we believe said constitution to be grounded.

"3d. That we acknowledge ourselves to be subordinate to none other than the classis and synod of the true Reformed Dutch Church, whose reasons for separating from the general synod, contained in their printed pamphlet, we approve and adopt, and do hereby declare ourselves to be united with them in the bonds of faith and love.

"4th. That James Lydecker and John Edsall be a committee to wait upon the Rev. Dr. S. Frœligh, with these resolutions, for his advice, and also to know whether he has authority to receive us."

At this same meeting, the deed from Cornelius Doremus, the complainant, to the corporation, for the lot of land on which the mortgage is given, was presented and accepted.

The following minute was then made, to wit: "It was ascertained, from the bills and receipts, that there remained a debt due on the building of the said school house and lecture room, of two hundred dollars; and, whereas, Mr. Cornelius Doremus is willing to advance the money for the payment of said debt, provided the consistory will secure him by a bond and mortgage on said house and lot at New Durham, *Resolved*, That a bond and mortgage be prepared accordingly."

On the second of February, eighteen hundred and twenty-four, another meeting of the consistory was held, at which all the members were present. There were also present Dr. Solomon Frœligh and Elder Isaac Van Saun, as commissioners of the classis of the true Reformed Dutch Church, who were received and acknowledged as such by the consistory. The

following minute then appears on the record of their proceedings: "The Rev. Dr. Solomon Frœligh asked whether this consistory had determined unanimously to dissolve their connexion with the classis of Bergen and the general synod, and to place themselves and this church under the care of the classis and synod of the True Reformed Dutch Church, and pledge their honor to subscribe the printed reasons for leaving the general synod? Each one of the elders and deacons answered in the affirmative. Whereupon, the reverend doctor, in token of their reception, gave to each member the right hand of fellowship."

Then comes the following: "The mortgage and bond referred to in the minutes of the last meeting, having been prepared, according to order, were presented and read, approved of, and duly executed by the signatures of the president and members, and the seal of the corporation."

On the tenth of February, eighteen hundred and twenty-four, the consistory again met, and the mortgage was acknowledged before John A. Westervelt, esquire.

On the seventeenth and eighteenth of the same month of February, Cornelius T. Demarest was, upon due notice given, tried upon charges preferred against him, by the classis of Bergen, and suspended from the ministry; and, at the same time, the elders and deacons were, by the said classis, deposed from their respective offices; and the members of the church were directed to supply the vacancies by the appointment of others.

Under this state of things, the question arises whether the acts of giving and executing the mortgage and bond are to be considered as valid and efficacious, so as to bind the property of the corporation.

According to the constitution and usages of the Reformed Dutch Church, the consistories of the church, composed of the minister, elders and deacons of each church, have the charge and control of all the temporal as well as spiritual concerns of the church and congregation. This is one of the peculiar features of the form of church government appertaining to that denomination of Christians. In seventeen hundred and ninety-nine,

when the general law was passed to incorporate trustees of religious societies, the legislature, willing to communicate equal privileges to all, enacted that the minister, elders and deacons for the time being, or if there be no minister or ministers, the elders and deacons for the time being, of every Reformed Dutch congregation, should be trustees of the same, and a body politic and corporate in law, by such name as the said trustees should assume: that by such name they should be able to acquire and hold property, have a common seal, sue and be sued, &c. And it further enacted, for the purpose of perpetuating a line of succession in the trustees, that those in office at the time of taking and recording a name as aforesaid, should continue in office until others should be duly elected, appointed or called, according to the manner, usages and customs of the church.

The result of the enactment is this, that, in the Dutch church, the consistories respectively, duly elected, appointed or called, are the legal trustees. They are recognized by the statute. The civil authority interferes in no way with their selection or appointment; but, leaving that to the church, it simply vests them, when duly selected and appointed, with all the rights and powers in regard to property, that the trustees of other religious denominations enjoy; and, to perpetuate the succession, declares that those in office shall remain in, until others are chosen.

It is evident, then, that the civil office of trustee grows out of the ecclesiastical office of minister, elder or deacon. Every minister, elder or deacon, properly called and instituted, is, *virtute officii*, a trustee; and he must necessarily remain such as long as his ecclesiastical office continues. When such office commences, how long it shall continue, and when and how it shall terminate, are matters which would seem to belong *primarily* to the ecclesiastical judicatories to determine.

In the case before me, the question of the power of the consistory to execute the bond and mortgage, must depend on the solution of another question, viz.: whether they were in office or not at the time. According to the law of the church, and the dec-

sions of their acknowledged tribunals, I think there can be no doubt that they were in office.

In the first place, they were lawfully elected and ordained, and thus formally inducted into office. They afterwards seceded; they renounced the authority of the classis and general synod, and at the very meeting at which the papers were executed, they joined themselves to what was called the True Reformed Dutch Church. They no doubt did all they could to unchurch themselves; but they did not resign, nor did they, by any other act, divest themselves of their offices. This is evident from the course taken by the church; for, secondly, the church, after their renunciation, considered, treated and dealt with them as officers. In no part of the proceedings which took place in consequence of the secession were they considered as having vacated their offices.

The whole subject came under the cognizance of the classis of Bergen, the proper judicatory of the church. No complaint was made to them that the consistory had vacated their offices, by seceding from the church and renouncing the authority of classis and synod. They did not investigate that matter, and declare that the offices were and had become vacant by the act of secession. On the contrary, they proceeded to try the consistory as being then in office and amenable to their authority. The charges against them were for slanderous abuse of the church generally, and also of the classis, and for public schism. They were tried according to the laws of the church, and found guilty; and the sentence of the court is as follows: "*Resolved*, That James Lydecker, Jacob T. Moore, Peter W. Banta, and John W. Banta, elders; Frederick Devoe, John Edsall, David J. Westervelt, and Bradley Randall, deacons, the present members of the consistory of the English Neighborhood, are guilty on both the charges to which they have been cited to answer, and that the seats of the said elders and deacons, as members of the consistory of the church at the English Neighborhood, be and hereby are declared vacant, and that said persons be and hereby are deposed from their respective offices."

No language can be plainer than that used by the classis.

That court declared, on the eighteenth day of February—sixteen days after the execution of the bond and mortgage—that the persons cited before them were then in office; that they were the "present members of the consistory;" and classis, by a judicial act of their own, disrobed them of their offices. Up to that period, then, there was, in the opinion of the church, no vacancy; and, of course, so long as the consistorial office remained, the consistory were trustees, and had power over the temporal concerns of the church.

There is another act of classis which tends strongly to show their opinion on this subject. On the twentieth of April, eighteen hundred and twenty-four, classis, at a regular session, reversed their sentence of deposition, so far as it related to Peter W. Banta and James Lydecker, two of the elders, on the ground that they had not been duly notified to attend and make defence; and the members of the church, instead of choosing an entire new consistory, elected four deacons and only two elders—thereby recognizing Banta and Lydecker as elders of the church at that time; and this was done by express order of classis.

This proves conclusively, if any further proof were necessary, that the regular courts of the church did not consider the secession of this consistory as divesting them of their offices. They still held them to be members and officers of the church, and dealt with them as such; and the classis, whose rightful office it was, actually deposed them, and *thereby* created the vacancy, and ordered it to be filled according to the rules and customs of the church.

Considering this case, then, in reference to the law of the church, I consider the bond and mortgage as having been executed by the consistory of the church of English Neighborhood, lawfully authorized for that purpose.

This conclusion, founded on the acts and proceedings of the ecclesiastical tribunals, accords with the general principles of the law. According to these, there must be a removal or amotion by a competent power, to determine an office. If there be a resignation, there must be an acceptance; or if there be an abso-

lute vacation of the office, such vacation must be recognized and acknowledged. Where the original title of an office is sufficient, though good cause of amotion be shown, even in a case where the charter declares that for such cause of amotion the officer shall vacate his office, the office is not determined until there be an amotion: *Lord Bruce's case*, 2 *Stran.* 819; *Rex* v. *Heaven*, 2 *T. R.* 772; *Angell and Ames on Corporations*, 487.

Where persons are officers, *de facto*, they are in *colore officii;* and their acts will be valid until they are lawfully ousted; and more especially as they respect third persons they are binding on the corporation: *Trustees of Vernon Society* v. *Hills*, 6 *Cowen*, 22; *Baird* v. *Bank of Washington*, 11 *Serg. and Rawle*, 411; *Angell and Ames on Corp.* 73, 74.

These are principles which need not be explained or enforced. As applied to this case, they lead to the result that the consistory were the trustees of the property when they undertook to deal with it.

There is another view of the case, which presents itself for serious consideration. These persons having been lawfully elected to their offices, their acts, if *bona fide*, must be considered valid, unless it be true, as the defendants contend, that their offices were forfeited by reason of their own misconduct. Is a court of equity a proper court in which to try the question of forfeiture? It cannot entertain the question directly. It ought not to pass upon it collaterally or incidentally, except in cases of necessity, if any such may arise. Questions of forfeiture do not appertain to this tribunal: *Slee* v. *Bloom*, 5 *John. C. R.* 377; *The Society for the Establishment of Useful Manufactures* v. *The Morris Canal*, &c., *Saxton*, 157. And if this court should determine that there was actually a forfeiture, how would such determination be reconciled with the judgment of the spiritual court on the same subject? If these men were not trustees, they were not elders and deacons—the acts of classis have been irregular, and this court must collaterally declare them void. All this would be unpleasant to the court, and might be attended with unhappy consequences.

In my view of the case the complainant is entitled to recover; and I think it is just and right, as between these parties, that he should recover. The defendants (the corporation) are in the enjoyment of the property of which this is a part consideration. There is a strong equity growing out of that circumstance alone; so much so, that it has been held that when property comes to the possession of a corporation, they are bound to pay: *Kyd on Corp.* 314. Suppose the bond and mortgage were set aside for want of legal right in the corporation at the time, would that pay the debt? Would not equity require the satisfaction of it? Upon that point there should be no doubt.

Let it be referred to a master to take an account.

ABRAHAM A. QUACKENBUSH v. ABRAHAM VAN RIPER and others.

When an injunction has been duly served on the defendants, they are personally responsible for a violation of the order of the court, in whatever capacity, or with whatever view they acted.

When new works are to be erected on an old possession, (the right of the complainant having been established,) equity will restrain.

The writ of injunction is not used to restrain any possible interference, however small, with the complainant's rights.

If the proprietor of land, by building a mill and raising a head of water on his own land, is about to cause serious and irreparable damage to his neighbor's property, equity will restrain him: but if the injury is comparatively small, and may be compensated in damages, an injunction ought not to issue.

An injunction will not issue for the prevention of every trespass or infringement of right, where a suit at law might be brought.

A party having established his right at law, stands, in regard to trespasses, and injuries of that character, in no better situation than one whose right is not disputed. Neither is entitled to protection by injunction unless the injury is serious, permanent and destructive of the estate.

THIS cause was heard upon a rule to show cause why an attachment should not issue against the defendants, for a con-

tempt in disobeying an injunction; and also upon motion on the part of the defendants to dissolve the injunction. The grounds of each application are fully stated in the opinion of the chancellor.

Dickerson, for complainant.

E. B. D. Ogden and *Vanarsdale*, for defendants.

Cases cited by defendants' counsel in support of the motion to dissolve the injunction. 1 *Cox*, 102; 2 *Vesey, sen.* 414; 2 *Atkyns*, 483; 6 *John. Chan. R.* 46; 4 *Hen. and Mun.* 474; 1 *Marsh*, 554; 1 *John. Chan. R.* 318; 7 *John. Chan. R.* 315, 330; 3 *Mer.* 148; *Eden on Inj.* 322; 6 *John. Chan. R.* 20; 3 *John. Chan. R.* 287; 3 *Atkyns*, 21; 4 *John. Chan. R.* 21; *Jer. Eq.* 311.

THE CHANCELLOR. On the twenty-first day of August, eighteen hundred and thirty-four, an injunction issued out of this court, directed to the defendants, commanding them to desist from building a dam across a certain stream called the Goffle brook, in the township of Franklin and county of Bergen, on the lands of the said Abraham Van Riper, so as by means thereof to flow back the waters of said stream on the land of the said Abraham A. Quackenbush, above his line, as designated by the bottom of the foundation of a dam called the turning-mill dam, formerly erected on said line by one Jesse Chapple, the site of which foundation yet remains. The writ was served on the twenty-fifth of the same month, on each of the defendants personally.

The complainant, alleging that the injunction had been disobeyed, applied for an attachment, and exhibited some affidavits in proof of the allegation; whereupon a rule was granted calling upon the defendants to show cause why an attachment should not issue against them. Testimony has been taken on both

sides, and the question now is whether the rule shall be made absolute, or whether it shall be discharged.

A number of witnesses have been examined, and the evidence is somewhat contradictory; but I think the evidence of Samuel Quackenbush, Jacob A. Terhune, David Myers, and Joseph Baldwin, is conclusive to show, that the water is flowed back beyond the sill or foundation of the turning-mill dam. Three of them swear positively that it is still-water for twenty-five paces above the sill. Myers and Baldwin are millwrights, and both state that the flowing back is owing to the dam of Van Riper below. This is not satisfactorily met or disproved by the answer or the witnesses of the defendants.

It is evident, therefore, that the command of the injunction has been violated and disobeyed by the defendant Van Riper. As to Munn and Whitehead, the other defendants, it is sufficiently proved that they were instrumental in raising the dam to its present height. They put on the last plank and pinned it. It is no justification to say, they did this to prevent injury to the dam, it being in part unfinished; or that the dam was not placed there at their expense or through their agency. They were parties to the bill. The injunction had been served on them; and in whatever capacity or with whatever view they acted, if the order of the court was violated, they are personally responsible.

The rule must be made absolute as to all the defendants.

It is now moved to dissolve the injunction on two grounds:— 1st. That it was improvidently issued—there being no equity in the bill. 2d. That the equity, if any, has been fully answered.

On looking again into the bill, I am satisfied that the injunction was properly ordered. The defendant, Van Riper, was building or erecting a dam across the brook, in lieu of the old one, which had been carried away by a freshet. The old one had flowed the water back above the complainant's line and on his soil and freehold. An action had been brought in the supreme court, and a recovery had of one hundred and forty-five dollars, for the damages sustained. The source of the injury not

being removed, another action was brought, and pending that suit the dam was swept away by a flood. I considered that the right of the complainant to the property on which the injury was committed, had been established by a verdict and judgment at law, and that the injury sustained was of a permanent and irreparable character. Such was the fair inference from the bill; and my conclusion was that equity might properly protect the complainant in the enjoyment of his right, against any threatened injury of a similar kind. Hence the order was, that the water should not be raised beyond the sill, which it was supposed had been established as the line between the parties.

The necessary erection of a new dam, on or near the old site, presented a favorable opportunity for the complainant to claim the protection of the court. If the old dam had remained, this court could have afforded him no aid: he must have been left to his remedy at law. But when new works are to be erected on a former possession, (the right having been established,) equity may restrain: *Weller* v. *Smeaton*, 1 *Cox's Ch. R.* 102.

The former dam of the defendant had been erected only six years. No grant to flow back the water could be presumed; the length of time was not sufficient, and the verdict of the jury was directly opposed to such presumption. Such being the case, it was within the legitimate power of the court to interpose so as to prevent future permanent mischief and injury to the complainant's possession.

It was supposed, from the scope of the bill, that if the defendant raised his dam, so as to flow back the water beyond a certain point, the injury formerly experienced must necessarily be renewed, and become permanent and destructive of complainant's property.

Upon these grounds the injunction was granted.

The answer of the defendants admits the suit and recovery. It was prepared and filed after the dam was completed, and denies that there is any overflow on the complainant's lands; the defendant, Van Riper, claiming title to the land seventy feet above the turning-mill dam. The answer also alleges that if the

land is the complainant's, and any of it is overflowed, it is of little or no value, being covered with rocks or stones at the bottom, and high rocks on the sides, and about ten yards wide in the broadest place; that the land is not used for any particular purpose, and the complainant's mill above is not injured in any way by the flowing back of the water.

How, then, stands the case on the motion to dissolve the injunction?

The answer expressly denies that there is any such flowing back by the dam as now erected, as to occasion any serious injury to the complainant's land. That strikes at the equity of the case. The injunction was not intended to prevent any other injury, than such as might be occasioned by the flowing back of the water. None other is charged or suggested in the bill. It was not intended to injoin the defendants against any possible interference, however small, with the complainant's rights. The writ is never used for such purpose.

If the case had been presented originally in the shape in which it now appears, the injunction would not have been granted; and I think it ought not to be continued.

Every proprietor of land has undoubtedly a right to build a mill and raise a head of water on his own land. If in so doing he is about to cause serious and irreparable damage to his neighbour's property, equity will restrain him; but if the injury is comparatively small and may be compensated in damages, an injunction ought not to issue. The party injured should be left to his legal remedy. In using small streams for milling purposes, it is almost impossible to prevent partial injury to some proprietor either above or below on the stream. If the injunction is to be used in every case of interference, very few of these streams could be appropriated to any useful purpose.

There is no charge in the bill, that the complainant is about to erect any other mills, or in any other way to appropriate or use the residue of the fall of the water on his premises, and that he is prevented from doing so by this dam. It is not pretended that there is any other mill-site there. One of the witnesses who

was examined, says the flowing back of the water will greatly injure the mill-site of the complainant; but in the bill there is no such charge, nor is the aid of the court sought on that ground. There is no pretence that this flowing back of the water affects in any way the complainant's mill above. Against such a result, if properly charged and made out, the court would promptly and carefully guard.

If, then, the injunction is continued, it must be simply on the ground that the water is flowed back a short distance, say seventy-five feet, beyond the line, without doing any material injury to the complainant. And on the same ground, equity must interfere in all cases where the least possible invasion of private property is about to occur by the erection of a dam. It would have to adopt the principle, that an injunction will issue for the prevention of every trespass or infringement of right, when a suit at law might be brought. But that is not the principle of this court. There are many cases in which trespass may be maintained, that will not justify an injunction. In *Jerome v. Ross*, 7 *John. Chan. R.* 331, the established doctrine of the court was fully recognized, that equity will not interpose by injunction to restrain a trespass, where the injury does not appear to be irremediable and destructive to the estate, and where the ordinary legal remedy in the courts of law can afford adequate satisfaction. The trespass there was for entering upon the plaintiff's land, and digging, throwing up and carrying away large parcels of stone from a ledge of stone and mass of rock on the premises. An action had been brought, and a recovery had, at law; but the court refused an injunction.

It is insisted, however, that there has been a trial and recovery for the injury, and therefore the complainant should be protected.

There may be some doubt, from the answer, whether the title was in issue in the suit referred to. But suppose it to have been made a question, and settled by the verdict, in connection with the question of damages, the amount of the verdict justifies the conclusion that the injury as then presented and shown was not

small and immaterial, but serious; and that the overflowing occasioned by the old dam was much greater than that caused by the present one. There is nothing in the whole case to show that the present dam flows the water back as far as the old one; and without this, the court cannot infer that the same damages would now be given by a jury, or that any thing more than nominal damages would be awarded. The dam is different, and the site is different; and though the water appears to flow to the mill through the same head race as formerly, there is nothing to show that the quantity flowing through it is the same. The mill is now lower down the stream, and less water may answer.

A party having established his right at law, stands, in regard to trespasses and injuries of that character, in no better situation than one whose right is not disputed. Both are regulated by the same rule; and neither is entitled to the protection of this court by injunction unless the injury is serious, and permanent, and destructive of the estate. I was induced from the bill to suppose that such injury would result from the dam in question, and this raised an equity in favour of the complainant. The answer of the defendant denies this equity; the facts do not support it, and the injunction must be dissolved.

I incline to believe that the breach of the injunction was not intentional on the part of the defendants. It is proved that Van Riper gave special directions to his workmen, after the injunction was served, not to flow the water back beyond the turning-mill dam. The facts disclosed in relation to the interference of Munn and Whitehead, are strong to show that their object was not to contemn the order of the court. Under these circumstances, and seeing that the injunction is to be dissolved, no further order will be made as to the defendants, than that they pay the costs of the application, and also pay their own costs on the motion to dissolve the injunction. Vide *Partington and al.* v. *Booth and al.*, 3 *Mer.* 148.

Order accordingly.

DAVID C. HUTCHINSON v. WILLIAM TINDALL.

A court of equity will hear a party who seeks relief against his own act on the ground of intoxication, though formerly such hearing was denied.

To avoid a contract on the ground of intoxication it must be shown, either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation.

If a person while in a state of intoxication, though not induced by the act or procurement of the grantee, execute an absolute conveyance of his property without consideration, equity will relieve against the conveyance.

But if a person while intoxicated voluntarily execute a deed of trust for the benefit of his wife and children, equity will not set it aside on the ground that undue advantage was taken of his situation.

A resulting trust may be established by parol.

But a trust coming within the provisions of the statute of frauds, can never be established by parol, especially where there is no mistake or omission alleged in preparing the instrument.

A declaration of trust requires no formality, so that it be in writing and have sufficient certainty to be ascertained and executed; and it is not material whether the writing be made as evidence of the trust or not.

Where a deed is made absolute on the face of it, and without any actual consideration paid, if the grantor seeks to set it aside on the ground of fraud, the answer of the defendant setting up a trust, unless directly responsive to the bill, will not be evidence of the trust.

But where the grantor files his bill claiming the deed to be a deed of trust, and the defendant by his answer admits it, the answer, *it seems*, will be good evidence of the trust, and a sufficient *writing* to support it.

Wilson and *Southard*, for complainant.

H. W. Green, for defendant.

Cases cited for complainant. 3 *P. W.* 131; 1 *Vesey*, 19; 18 *Vesey*, 15; 4 *Dess.* 364; 1 *Wash.* 164; 1 *Hen. and Mun.* 70; *Powell on Cont.* 67, 69; 1 *Comyn on Con.* 3; 1 *Fonb. Eq.* 40; *Rev. Laws*, 152; 3 *Stark. Ev.* 995, 1002; 7 *Vesey*, 219; 1 *P. W.* 618; 3 *Atkyns*, 388; 1 *Ves. and B.* 378; 1 *John. Chan. R.* 281, 428; 2 *Atkyns*, 384; 1 *Atkyns*, 447;

3 *Atkyns*, 8; 1 *Ves. and B.* 524; 1 *Dess.* 337; 2 *Penn.* 1003; 3 *Hals.* 71.

Cases cited for defendant. 1 *Vesey*, 19; 18 *Vesey*, 12; 1 *Eq. Cas. Ab.* 88; 1 *Green*, 242; 4 *Wash. C. C. R.* 268; 2 *Kent's Com.* 451; 13 *Vesey*, 88; 3 *Bro. C.* 443; 4 *Kent's Com.* 455; 1 *John. Chan. R.* 251; 3 *Stark. Ev.* 1018–19; 2 *Atkyns*, 203; 1 *Fonb. Eq.* 200, (o); 2 *P. W.* 151.

THE CHANCELLOR. The complainant seeks the decree of this court to set aside, as fraudulent and void, a deed from himself and wife to the defendant, for a farm of about one hundred and seven acres, in the county of Burlington. He alleges, that while in a state of great intoxication, at the dwelling-house of the defendant, where he was invited to drink and did drink spirituous liquor, he was requested by the defendant to sign a paper which was presented to him, and that he undertook to sign his name to it, but believes he did not sign it. A few days after, he was informed by Nathaniel Dunn that he had signed the paper, and that it was a deed conveying to him his farm in fee simple. He has no recollection of having signed such instrument, and must have been wholly or partially deprived of his understanding at the time. That the deed is wholly without a good or valuable consideration. The prayer of the bill is, that the deed and the record of it may be cancelled, or that the defendant may be compelled to pay to the complainant the full value of the farm.

The defendant says, in answer, that Hutchinson and wife made and executed the deed, for the consideration of two thousand dollars, expressed in the instrument; that it was acknowledged, on the day of its date, before Andrew Rowan, esquire, by the grantors, and afterwards recorded. That the property was acquired with the money of Hutchinson's wife, who was the sister of defendant; and Hutchinson having become habitually intemperate, he was induced, at the solicitation of his sister, to consent to become a trustee for herself and children, in case the complainant and his wife should choose voluntarily to convey

any part of the property to him for that purpose. That on the day the deed bears date, the complainant and his wife came to defendant's house, and there voluntarily proposed to convey to defendant the premises in fee simple for the benefit of the wife and children of the complainant, and desired a deed to be prepared for that purpose. That defendant prepared the deed, and read it over carefully to both Hutchinson and his wife, and then delivered it to Hutchinson, who with his wife went immediately to Andrew Rowan's to have it acknowledged. They afterwards returned and delivered the deed, executed and acknowledged, to the defendant. He expressly denies that Hutchinson was intoxicated or in any way deprived of his reason or understanding; and alleges that he was not under the influence of intoxication, and was fully competent to dispose of his property, and that the deed was executed voluntarily, and with a full knowledge and understanding of its contents. He also expressly denies giving to complainant any spiritous or other intoxicating liquor until after he had prepared the deed and read it to complainant, nor, as he believes, until the complainant and his wife returned from esquire Rowan's; when, observing that the complainant was trembling for the want of his ordinary stimulus, he gave him some with the consent of his wife, believing it would be of service; and so far as the defendant knows, the complainant drank no other spirituous liquor that day.

The defendant further admits, that he paid no part of the consideration money; and alleges that he holds the property for the use and benefit of the wife and children of the complainant; and that he has, with his own funds, paid off a mortgage on the premises of four hundred and fifty-three dollars and thirty-three cents, and caused it to be delivered up to be cancelled.

He does not object to a decree securing more satisfactorily to the wife and children of complainant their interests under the deed, nor to another trustee.

Much testimony has been taken on both sides to show the real situation of Hutchinson at and about the time the deed was executed. It appears that he was an intemperate man, sometimes

drinking to excess, and carrying his intemperance so far as to occasion at times something like temporary derangement. He had a wife and five children, and owned a farm, which, with the improvements on it, was worth upwards of two thousand dollars; and that he had received of his wife more than that amount of property, with which he was enabled to settle himself comfortably in the world. He had been much in liquor about the time the deed was given, and some of the witnesses state that on the morning of that day they saw him stagger as he walked. He got into his brother's house by holding on to the door posts, and could not get into his wagon without assistance. The witnesses differ in regard to his capacity for business at the time he made the deed, as is usual in cases of this kind. My own conclusion from the whole of the evidence is, that he was not so far intoxicated as to be rendered incapable of transacting every kind of business, but that he was, nevertheless, considerably under the influence and excitement of ardent spirits, and not competent to attend to his concerns with prudence and judgment. He was, at least, partially intoxicated, and to such a degree that the court must apply to this case the principles that apply to similar cases when a party comes to have a contract set aside on the ground of intoxication.

These principles have frequently been discussed in this court, and appear to be settled. From all the cases it may be laid down,

1. That the court will hear any person who seeks relief on this ground. Formerly such hearing was denied. The party setting up such defence could not be heard: *Johnson* v. *Medlicott*, cited 3 *P. W.* 130.

2. That the fact of intoxication is not of itself sufficient to avoid a contract: *Cory* v. *Cory*, 1 *Ves. sen.* 19.

3. That to avoid the contract, it must be shown, either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation: *Cooke* v. *Clayworth*, 18 *Ves.* 12; *Adm'rs of Wilmurt* v. *Morgan, Opin. of Ch. Williamson*,

Mar. 1827; *Crane* v. *Conklin*, *Saxton*, 346; *Pettinger* v. *Pettinger*.*

Considering these principles as settled, we are to inquire, in the first place, whether the intoxication of the party was procured in any way by the defendant. Upon this part of the case there is no doubt. The allegation, though made very directly in the bill, is shown to be wholly incorrect. No liquor was furnished by the defendant, or any of the family, until in the afternoon, after the whole business was completed. Then a little was given, with the consent of Mrs. Hutchinson. Not only so, but there is no evidence that he tasted any thing at esquire Rowan's, or in going or returning thence. If, then, he was intoxicated, it was not through the agency of the defendant.

We are next to inquire whether any undue advantage was taken of his situation. Was the contract an unconscionable one? Was the act unreasonable or improper?

If this is to be considered an absolute conveyance—as it appears to be on the face of it—there having been no consideration paid, it would appear to be unreasonable. No one can presume that Hutchinson intended to give away all his farm; and if such pretension were set up by the defendant, I think the court would relieve against it.

If it is to be considered a deed of trust, as alleged by the defendant, then the case is essentially altered, for there is a good consideration to support the instrument. We find from the evidence, that such a step had been contemplated. The complainant had been advised that very morning by Dunn, one of his own witnesses, to give a deed of trust or power of attorney to one of his brothers; and he said he could not do that, but he wanted somebody to act for him. This same witness tells us three different times in the course of his examination, that Hutchinson believed it was a deed of trust he was signing. Taking this to be the fact, I cannot undertake to say that such conveyance was unreasonable or improper. The property was purchased with the money of the wife. She had borne to him five

* Ante, page 156.

children, who were to be taken care of and provided for. He was an intemperate man. He appeared to be sensible of his inability to manage his own concerns, at all times, in a proper way. If, under these circumstances, he thought proper to place this part of his property in the hands of a friend for the benefit of his wife and children, a court of equity will hardly interfere to set it aside, on the plea of an improper advantage being taken of the party's situation.

The question then arises, How is this deed to be made a deed of trust? It is absolute on the face of it; how then can it be altered in its terms by parol proof?

If this were a resulting trust, the case would be clear of this difficulty; for such a trust may be established by parol. But it is a trust of a different character, coming within the provisions of the statute of frauds. Such a trust can never be established by parol, especially where there is no mistake or omission alleged in preparing the instrument. In some instances of that description, such proof has been received; and many judges are of opinion that the security intended to be guaranteed by the statute has been thereby already greatly diminished.

It is sought, in this case, to establish and define the trust, by the answer of the defendant. In that, as has been seen, he states what he alleges to be the true consideration of the conveyance; and proffers his willingness to execute a declaration of trust, or secure the interest of the wife and children in any way the court may direct. Can this answer of the defendant be recognized as competent and sufficient evidence to establish the trust? A declaration of trust requires no formality, so that it be in writing, and have sufficient certainty to be ascertained and executed. It may be in a letter, or upon a memorandum; and it is not material whether the writing be made as evidence of the trust or not. The recital in a deed has been held to be a sufficient disclosure: *Bellamy* v. *Burrow*, *Ca. Tem. Talb.* 97; *Deg* v. *Deg*, 2 *P. W.* 412; *Kirk* v. *Webb*, *Prec. Ch.* 84; *Jeremy's Eq.* 22.

It has been held in the English courts, that an answer to a

bill may be a good declaration of trust. I am inclined to believe that if the present complainant had filed a bill claiming this deed to be a deed of trust, and praying that it might be so decreed, according to the original intention of the parties, that the answer of the defendant, admitting the trust, would have been good evidence of it. It would have amounted to a sufficient declaration of the trust. But it would seem to be different when a complainant seeks, on the ground of fraud, to set aside a deed absolute on the face of it, and confessedly without any actual consideration paid; for, as was well observed by the complainant's counsel, to suffer a defendant in such case to come in and avoid the claim, by setting up a trust, would be to permit him to create a trust according to his own views, and thereby prevent the consequences of a fraud. And yet respectable authorities appear to consider that it may be done. In *Hampton* v. *Spencer & e contra.*, 2 *Vern.* 288, the case was this. The complainant, Hampton, in consideration of eighty pounds paid by the defendant, Spencer, conveys a house and surrenders a copyhold estate to the defendant and his heirs. The bill was for a reconveyance on payment of the remainder due of the eighty pounds and interest. The defendant, by answer, insisted that the conveyance was absolute to him and his heirs, without any proviso, clause or agreement that the complainant might redeem; but confessed it was in trust, that after the eighty pounds, with interest, was paid, defendant should stand seized for the benefit of the complainant's wife and children, although no such trust was declared in writing. For the complainant it was insisted, (as was done in this case,) that he having replied to the defendant's answer, who had not made any proof of such pretended trust, he was bound by his confession that he was not to have the estate absolutely to himself, and no regard ought to be had to the matter set forth in avoidance of the complainant's demand, because the defendant had not proved it; yet the court decreed the trust for the benefit of the wife and children. This is certainly a strong decision in favor of the defendant. The only difference in the two cases is, that in the one case the complainant sought to redeem, and in

the other he seeks to set aside the original conveyance; and I do not see that this difference varies the principle. The trust is not charged in the bill in either case.

The general rule in relation to answers, how far they shall be considered as evidence, is, that when a party's answer is responsive to the bill, it shall be evidence; but when he undertakes to set up new, distinct and affirmative matter, not fairly responsive to the bill, such matter must be proved. What shall be considered responsive to the bill, is often a subject of controversy. Here the party is required by the bill to disclose what was the consideration of the deed. In answer, he states what consideration appears on the face of the deed, to wit, the sum of two thousand dollars. He is also required to disclose whether he has paid the consideration, or secured it to be paid. To this he answers, that he paid no part of the consideration money expressed in the deed, and that there was none to be paid according to the original understanding between the parties to the said deed of conveyance; and that he holds the said premises, not for his own use or benefit, but for the use and benefit of the family of the said Hutchinson.

I incline to the opinion that this must be considered matter in avoidance, and not properly responsive to the bill. There is no trust charged, or any thing in the nature of a trust. When the complainant inquired what was the consideration of the deed, and whether any part of it was paid or secured to be paid, he intended a money consideration. He had no reference to any use, declaration of trust, covenant, or understanding between the parties. It was simply as to the money paid or secured to be paid. He had a right to make inquiry as to that and omit every thing connected with it. The authorities on this subject are not entirely uniform, arising chiefly from the difficulty of applying the rule to the particular case. In *Gilb. L. E.* 45, there is a leading case decided by lord chancellor Cowper. It was a bill by creditors against an executor for an account. The executor stated in his answer, that the testator left eleven hundred pounds in his hands, and that afterwards, on a settlement with the testator,

be gave his bond for one thousand pounds, and the other hundred pounds was given him by the testator as a gift for his care and trouble. There was no other evidence of the eleven hundred pounds having been deposited with the executor. A replication was filed; and it was ruled, that what was confessed and admitted by the answer was good against the defendant, but that he must establish by proof what was inserted by way of avoidance; or in other words, he must be charged with the whole sum unless he could prove the gift as he had stated it. In *Thompson* v. *Lamb*, 7 *Ves.* 587, lord Eldon said he was clearly of opinion, a person charged by his answer, cannot by his answer discharge himself. And the same rule was admitted in *Boardman* v. *Jackson*, 2 *Ball and Beat.* 382. In *Beckwith* v. *Butler*, 1 *Wash. Rep.* 224, the court say, the answer of a defendant in chancery is not evidence where it asserts a right affirmatively, in opposition to the plaintiff's demand. In such a case he is as much bound to establish it by different testimony, as the plaintiff is to sustain his bill. It would be monstrous indeed if an executor, when called upon to account, were permitted to swear himself into a title of part of the testator's estate. See also *Paynes* v. *Coles*, 1 *Munf. R.* 373; *Bush* v. *Livingston and al.*, 2 *Caine's Ca. in Er.* 66. In *Green* v. *Hart*, 1 *John. Rep.* 580, the doctrine was carried out to its fullest extent by the court of errors in New-York. Hart charged in his bill, that he paid a full and valuable consideration for the note endorsed to him by Green; and Green, in his answer to this charge, and to the interrogatory founded on it, alleged that part of the consideration was usurious. Chancellor Lansing held, that this allegation was merely in avoidance, and was not sufficient without other proof. The decree was affirmed by the unanimous opinion of the court of errors. Mr. justice Spencer, in delivering the judgment of the court, said, "I view the appellant's answer, charging usury, as insisting on a distinct fact by way of avoidance. The respondents having replied, and given him an opportunity to prove the fact, and he having failed to do so, his answer is no evidence of the fact. This is a well established

principle in chancery proceedings, and will be found recognized in every treatise on evidence in that court." In *Hart* v. *Ten Eyck*, 2 *John. Chan. R.* 62, chancellor Kent recognized these authorities, and approved the rule as perfectly just; saying, that a contrary doctrine would be pernicious, and render it absolutely dangerous to employ the jurisdiction of this court; inasmuch as it would enable the defendant to defeat the plaintiff's just demand by the testimony of his own oath, setting up a discharge or matter in avoidance. That was the case of an account, and the question was, whether the charges for disbursements should be allowed upon the strength of the answer. It was adjudged that they could not. This decree was afterwards reversed in the court of errors, and upon this very point; but as there is no report of the case, (other than a mere note in 1 *Cow. R.* 744,) and the precise view of it cannot be ascertained, I am not disposed to consider it as overturning a whole series of decisions, such as have been referred to. Out of this last adjudication has grown the later one (in the same court) of *Woodcock* v. *Bennet*, 1 *Cowen*, 711, where a pretty broad and general answer was considered as responsive to the bill; but on examination I think this last case proves nothing to the point, for the answer is not more broad and spreading than the interrogatory.

It is to be remarked, that in all the authorities referred to, the matter set up in avoidance was one of personal benefit to the defendant. It was an attempt to make evidence for himself. In that particular, this case is different; for the party seeks no benefit growing out of the trust. I am not prepared to say that this difference will alter the principle. If the facts alleged are not responsive to the bill, they are of no avail. It is the peculiar privilege of the complainant in this court, to say how far, and to what particular points of the case, he will probe the conscience of the defendant, and thereby make him a witness. Advantage may be taken, at times, of this privilege, so as to hinder justice; but the evil is small compared with what would result from considering the whole of the defendant's answer as evidence, whether strictly responsive to the bill or not.

Independently of the answer, the allegations respecting the trust are not proved. The strongest evidence is that of Dunn; who states it as his belief, that Hutchinson, when he executed the deed, thought it was a deed of trust. This might, with some of the other circumstances in the case, be sufficient to establish a trust of some kind; but it leaves us entirely ignorant of the nature of the trust intended; and if a trust be of so vague a character that a court cannot tell how to construe or to execute it, it is as none. There is some other evidence, but in my view very inconclusive. The facts, that Hutchinson spoke of this deed afterwards in the presence of one of the witnesses; that he was present when the agreement for a lease was made between Tindall and Hughes, and when Tindall paid off the mortgage to Cubberly, do not either separately or in the aggregate, prove the fact of a trust, or the terms of it.

From this view of the law and the evidence, there is no trust made out in this case—unless allegations of trust contained in an answer are exceptions to the general rule. The decision in *Vernon* would seem to favor this idea; but I cannot find, after a diligent search, that it has ever been followed. And not being satisfied with its correctness, I feel unwilling to make it the foundation of a judicial decision. The result then is,

1. That Hutchinson was, by reason of his situation, entitled to the protection of the court, so far as to authorize an inquiry whether the intoxication was procured, or whether any advantage was taken of his situation.

2. That the deed being executed while in this state, for an alleged consideration on the face of it of two thousand dollars, which it is admitted is not to be paid and was not intended to be; and the trust asserted by the defendant in his answer not being proved, it cannot be sustained for the purposes of that trust; and no other purpose or trust being set up, or pretended, the deed is without consideration, and void as against the grantor.

I am of opinion, therefore, that the deed ought to be delivered up to be cancelled, and that the property be reconveyed by Tindall to Hutchinson; and as I have no reason to believe that any

actual fraud was intended, I think it right that Tindall should be allowed the amount he paid to discharge the Cubberly mortgage, together with interest on it, and that the cancellation and reconveyance be upon that condition.

I have considered this case under the conviction that the situation of Hutchinson was such, at the time of the transaction, as to entitle him to the protection of the court. In this matter of fact I may possibly be mistaken; although, I am free to declare, that after anxiously reviewing the whole testimony, I see no reason to doubt the conclusion. If, however, I should be in error, it would not materially alter the rights of the parties: for if the trust, as set up by the answer, cannot be sustained, no benefit can accrue under or out of it to those who informally claim as cestui que trusts, and for whose interest alone the court has been asked to sustain this deed. No other trust or purpose is pretended; and, of course, none other can be established. The deed being, then, without consideration, could not enure to the benefit of the grantee. It would be decreed for the benefit of the grantor, as a resulting trust. And, although it could not be so decreed with the present pleadings, the complainant might be permitted to file a supplemental bill, and have the benefit of such decree.

Costs are not allowed on either side, as against the other.

Decree accordingly.

ANN OLIVER v. MARY OLIVER and others.

The testator by his will gives personal and real estate in trust to provide a home or residence for his daughters, the survivor or survivors of them, so long as they remain single and unmarried. *Held* that the trustee was bound to provide one home or residence for all the daughters, and not a home or residence for each one separately.

If the trustee, by her misconduct, deprives the cestui que trust of the free enjoyment of the trust fund in the mode pointed out by the testator, equity may direct that she shall enjoy it in a different mode.

[Oliver v. Oliver et al.]

But this court will not interfere with the appropriation of the trust fund so as to direct it differently from the intention of the testator, except in a very clear case.

A mere difference of opinion among the cestui que trusts, or an indisposition to live under the same roof, will not be sufficient.

* An amicable adjustment of a family controversy recommended, and the opinion of the court withheld to afford an opportunity for that purpose.

THIS bill was filed by the complainant, as one of the legatees and cestui que trusts under the will of her father, John Oliver, deceased, against the executrix and trustees named in the will. The prayer of the bill is, that an account of the personal estate may be rendered by the executrix; that the will may be established; that an account may be taken of the trust fund; and that the trusts may be performed under the direction of the court. The grounds of the relief sought for by the complainant, are stated in the opinion of the chancellor.

W. Halsted and *Wall*, for complainant.

H. W. Green and *Southard*, for defendants.

THE CHANCELLOR. John Oliver died at Bordentown, in the county of Burlington, in the latter part of April, eighteen hundred and twenty-four, leaving a last will and testament duly executed to pass real estate. After disposing of sundry specified parts and portions of real and also of personal property, he gave all his writings, notes, bills, bonds, stock, and debts due to him, to his daughter Mary, in trust to pay all his debts and expenses, and to divide the residue into ten equal parts or shares; one for each of his sons, viz. John, Washington, Franklin, and Thomas; and one for each of his daughters, viz. Elizabeth, Margaret, Rebecca, Ann, and Mary. The remaining share he gave to Mary in trust, to manage the same for the aid and assistance of Sarah, the wife of his son Robert, and their children, in such

* NOTE. In compliance with the recommendation of the chancellor, the cause was settled by the parties.

way and manner as she the said Mary, in prudence, might judge best; and directed that no person should call her to a settlement; that her own prudence and conscience should be her guide and judge. The will then makes the following provision:—"Item. All the residue of my real estate in Bordentown and Chesterfield, also in Bucks county, Pennsylvania, together with all the residue of my personal estate of every description whatsoever, and wheresoever the same may be, I give to my son Thomas Oliver and his heirs, and to my daughter Mary and her heirs, *in trust*, for the uses and purposes herein after mentioned; that is to say, in order to provide a home or residence for my daughters Mary, Margaret, Ann, and Rebecca Oliver, the survivor or survivors of them, so long as they remain single and unmarried. It is my will that my said daughters, the survivors or survivor of them, shall have and hold the aforesaid residue for and during the time my said daughters, the survivors or survivor of them, remain single and not married. Also it is my will that my daughter Mary shall receive the rents and profits of the said residue for the use of herself and sisters, and have the care and management of the family; and that the annual proceeds of my point fishery at William Moon's, shall be subject to the payment of Ann Brookes Radstrake's legal demands against my estate, and to be paid by my said daughter Mary." The testator then directs, that at the termination of the estate thus given to his single daughters, the trustees shall sell it, and divide the net proceeds among all his children; and of his said will appointed his daughter Mary sole executrix—who duly proved the same, after the decease of the testator, before the surrogate of Burlington.

The bill is filed by Ann Oliver, against Mary Oliver, as executrix, for an account of the personal estate; and against her and Thomas P. Oliver, as trustees under the will; and especially against Mary as one of the trustees, specially entrusted with the receipt of the rents and profits of the trust property, and the appropriation of them according to the will; and charges that they have been misapplied, and that complainant has been obliged by mal-treatment on the part of Mary, to leave the house,

and cannot reside with her; and prays that an account may be taken, and the will established, and the trusts performed, under the direction of this court.

The answer denies the charges of misapplication, mal-treatment, &c.; and insists that if Ann, the complainant, has not received her full proportion of the fund, it is because she refuses to live with the rest of the family; that she has voluntarily, and without cause, left them, and taken up her residence elsewhere.

On looking into this case, it appears, that the executrix has long since settled up the personal estate according to law; and that the complainant has received her share or proportion of that part which remained for distribution, according to the will, after the payment of debts and expenses. That part of the case may, therefore, be laid out of view. The bill sets up no charge of fraud or mistake; and I do not perceive any ground to impeach the settlement before the orphans' court, nor is such impeachment intended.

The controversy between these parties grows out of that trust in the will which was created for the benefit of the unmarried daughters. Rebecca, one of the daughters, is dead; Mary, Ann, and Margaret, remain unmarried. A family difficulty exists, and has existed for a number of years. It commenced, as near as can be ascertained from the evidence, shortly before the death of the testator. Ann has, in consequence of it, left the family; and insists that, according to the true construction of the will, she is not compelled to live with them; or if such was the meaning of the testator, that by unkind and improper treatment she has been compelled to leave the house and take her residence elsewhere; and that she is entitled to receive her proportion of the rents and profits annually, at the hands of Mary her sister. All this is resisted on the part of Mary, as opposed to the intention of the testator.

As to the true construction of the will on this subject, I cannot entertain any doubt. The testator intended, as it appears to me, that the unmarried sisters should live together as one family,

having one common home, until they should marry. Mary is constituted the special trustee. All the proceeds of the trust property were to come into her hands. The testator placed unlimited confidence in her prudence and integrity, and he constituted her the head of the family. He expressly declares the trust to be, to provide a home or residence for his unmarried daughters and the survivors and survivor of them. The natural signification of this phrase appears to be, one home, one residence for all, and not a home and residence for each one separately. They had always had a common home. They were destitute of a mother; and it is just and reasonable to suppose that the testator intended and desired that they should continue to reside together as they had theretofore done. A subsequent part of the clause strengthens this construction, and places the matter in a very clear point of view to my mind. He not only makes Mary the receiver of the whole fund for their use, but gives to her "the care and management of the family." He contemplates, of course, the existence of a family after his departure; and as it is meet that every family should have a head, he appoints a head for this one. If such was not the intention, it is scarcely probable that the testator would have divided the duties of the trustees, and placed the whole receiving and disbursing power in the hands of one, and that one a female. If each daughter were to receive a proportion, or might claim it at her pleasure, why not order a distribution at once, and if they chose to live together they could do so without any direction from the testator. This would have been the more natural course.

Upon the face of the will itself, I think there should be no difficulty as to the construction. And the testator had good reason for such a provision. His property was not large, and his children were numerous. These daughters received as their share of the divisible property only four hundred and thirty-three dollars and ninety-nine cents. The avails of the trust fund were limited, for the profits of the fishery were appropriated to the payment of an old debt. He knew that as one family they could live much more economically than they could in any other

way, and withal more respectably; and he arranged the provisions according to his own just views of propriety.

For these reasons, I am of opinion that the construction sought to be given to this trust clause by the complainant, is not the true one.

It remains to inquire, whether she is entitled to relief on the second ground, viz. that her treatment has been such from Mary as to render it impossible to reside with her as a member of the same family. The complainant insists that she has really been driven away; and she seeks, on that ground, to have an account taken, and her share or proportion of the proceeds of the trust property paid to her.

This inquiry opens up the whole family controversy. The evidence in relation to it is very voluminous, and to spread it out before the public would be profitless to the court, and discreditable to the family. I shall not attempt it. There is blame, probably, on both sides; and it would be of little importance to ascertain with certainty who deserves the greater share. One thing is certain; this court will not interfere with the appropriation of this trust fund, so as to direct it differently from the intention of the testator, except in a very clear case. A mere difference of opinion among the cestui que trusts, or an indisposition to live under the same roof, will not be sufficient. Difficulties existed in the family of the testator before he died, and he must have known it. Yet he made no alteration in his will.

I am prepared to express an opinion, which, so far as the judgment of this court goes, will settle the legal rights of the parties for the present. But in my view this is a case peculiarly proper for amicable adjustment. If these sisters have friends, it is very desirable that an effort at reconciliation should be made, yet again. The intention of the testator is now ascertained. Possibly it may be acquiesced in; and if so, it might be a happy circumstance, and tend to the peace of the whole family. It would be better than if done under the direction of the court.

If a reconciliation is impossible, some terms as to the proportion of the rents, &c. which the complainant would be willing to

receive, or which the defendants would be willing to give, might be agreed on; and this, too, would be better than if done under the direction of the court.

The restoration of peace to this family, is of much greater importance than the settling of any principles of law, in the decision which the court may be called to make. I recommend that the effort be made. This course may seem novel; but there are precedents to justify it; and in almost all of them, the recommendation of the court has had the desired effect.

THOMAS SINNICKSON and others v. WILLIAM JOHNSON and ISAAC JOHNSON.

An injunction granted on notice, and after hearing upon affidavits on both sides, and especially upon the affidavits of the defendants themselves, going to the merits, will not be dissolved on the answer of the defendants.

MOTION to dissolve injunction.

THE CHANCELLOR. An application was made for an injunction against the defendants, to prohibit them from erecting or finishing a dam across Salem creek; on the ground, that if erected, it would be a nuisance, and destructive of private property. Notice of the application and hearing was ordered to be given, with a copy of the bill. On the hearing, affidavits were read in support of the bill, and counter affidavits on the part of the defendants, and among others the affidavits of the defendants themselves, touching the merits of the cause. After full argument and time to advise, an injunction was ordered. The defendants then put in their answer, and moved to dissolve the injunction; alleging that the equity of the bill was fully answered. The argument was postponed from time to time, and in the mean time the complainants have proceeded to take testimony in the cause, and have taken a rule to close testimony in fifty days.

This has nearly expired, and the defendants have applied for and obtained an extension of the rule for a limited time.

Under existing circumstances, I think the injunction should not be dissolved. I know of no case, where an injunction, after being granted on notice, and after hearing upon affidavits on both sides, and especially upon the affidavits of the defendants themselves, going to the merits, has been dissolved on the answer of the defendants. The practice, as a general one, would be not only novel, but dangerous; and in the present case would be virtually deciding the merits of the controversy. As the cause can be heard at the next term, and it is the intention of both parties to have it then finally disposed of, I think the court should not interfere. The case is one of magnitude to those interested, and should be finally decided upon a full hearing of the merits.

The application is denied.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

JANUARY TERM, 1836.

The ADMINISTRATORS of JOSEPH WHITE, deceased, v. HUMPHREY WILLIAMS and others.

If a mortgage deed is prepared agreeably to the intention and instruction of the parties, reading it erroneously to the mortgagor before execution will not avoid it.

When a deed is executed by the grantor, and deposited with a third person until the grantor shall have an opportunity of acknowledging it, and then to be delivered to the grantee; it is not an escrow, nor can the grantor avoid the deed by refusing to acknowledge it.

A suit for the foreclosure of a mortgage is not a personal action. It is a proceeding *in rem* against the land, not against the person of the debtor, and the defendant will not be permitted to set off any demand he may have against the mortgage debt.*

Nothing can be set up against the incumbrance except payment, which operates directly as a release of the incumbrance, *pro tanto*.

BILL for foreclosure, filed by the administrators of the mortgagee, against the mortgagor, and the purchasers of the equity

* Accord. 4 *John. Chan. R.* 616; *Troup* v. *Haight*, 1 *Hopkins*, 239. See also *Pettat* v. *Ellis*, 9 *Vesey*, 563; 3 *Powell on Mort.* 945, a. Note W.

But under the revised statutes of New-York, (2 *Rev. Stat.* 174, sec. 40,) setoffs are allowed upon a suit for foreclosure, as in actions at law: *Chapman* v. *Robertson*, 6 *Paige*, 629; *Holden* v. *Gilbert*, 7 *Paige*, 211. See also *Roosevelt* v. *Bank of Niagara*, *Hopkins*, 579.

of redemption. The answer admits the mortgage, but sets up various grounds of defence in avoidance of the claim, which are stated in the opinion of the chancellor. The cause was heard upon bill, answer, replication and proofs.

Randolph and *Scott*, for complainants.

Ryall and *Wall*, for defendants.

THE CHANCELLOR. The bill was filed to foreclose the equity of redemption in lands mortgaged by Humphrey Williams to Joseph White, by deed of mortgage bearing date the twenty-fifth day of April, eighteen hundred and thirty-one, and registered on the thirty-first day of March, eighteen hundred and thirty-two. The amount of money secured by the mortgage, was five hundred and fifty-five dollars and seventy cents. John Field and Curtis Williams are purchasers of the equity of redemption, by deed bearing date the third day of April, eighteen hundred and thirty-two.

The defendants, in their answer, set up various matters of defence. They admit that Williams was, at the time of the giving of the mortgage, seized of a farm in Shrewsbury of one hundred acres, more or less; and say that Joseph White was a man of singular and parsimonious habits, without any family; that every winter except one, from eighteen hundred and five and eighteen hundred and six, until the time of his death, in March, eighteen hundred and thirty-two, he had been in the habit of living and boarding at the house of Humphrey Williams, until eighteen hundred and twenty-nine, at the expense of Humphrey Williams, and from eighteen hundred and twenty-nine to eighteen hundred and thirty-two, at the expense of Curtis Williams; that he commenced his visits at the beginning of winter, and in the spring following he would generally proceed to Newark, where he would rest until the fall following, and then return; that during the winter he generally employed himself in making wooden shovels, which he sold for his own use and benefit; that

during these several visits, during the early part of them, he lent to Humphrey Williams, at different times, the sum of fifty dollars, and one hundred and fifty dollars, for which Humphrey gave his notes, with Daniel Williams as his surety on one of them; and afterwards gave him two other notes for small amounts of fifteen dollars each, for interest money; that at that time and at other times, White told Humphrey and Curtis Williams that these notes should be settled in his board and living, and that they should not be brought against him; and that during all this time White never paid any thing for his board, and the whole claim remains unpaid; that White was extremely filthy in his habits, and nothing but the promises before stated, and the general inoffensive character of White, induced defendant to keep him in his family. His board, on the average, was two and a half months for twenty-two winters, and was worth two dollars and fifty cents per week. In the spring of eighteen hundred and thirty-two Humphrey Williams was taken very ill, and as he was getting better, White told him he was going away, and unless he, Williams, would give him a mortgage for the money due him, he would have him arrested immediately. The defendant, Humphrey Williams, being seventy-seven years old, weak and infirm, told him he would do any thing to prevent such a course; and without consulting with his family, Williams went with White to the store of Stephen Edwards, about half a mile off; that while there White became very much intoxicated, and threatened Williams that unless he signed the bond and mortgage then preparing by Edwards, he would take him off to the court-house. Williams understood Edwards and White that the mortgage only included twenty acres of his farm. Being weak and alarmed, the papers were executed, without any allowance for board, the defendant, Williams, in his agitation having forgotten it, not knowing what he was doing.

The answer goes on further to state, that when the bond and mortgage were executed, Williams was not indebted to White, but White was indebted to Williams in a considerable balance; that Williams requested afterwards of White and Edwards the

notes for which the mortgage had been given, which they refused to deliver up, and he has never been able to get sight of them; that White went to Newark the next morning. The defendants further state, that they believe the bond has been altered in a material part, viz. in its date, being altered from eighteen hundred and thirty-one to eighteen hundred and thirty-three, without the consent of the defendants or either of them. They also set up that White did not intend to charge Williams with the amount of the notes, and on one occasion directed one Britton White to destroy them in case he, White, should die; and that in his last illness, about five hours before his death, he directed Drummond White to go and get the bond and mortgage and notes of Stephen Edwards; and that Edwards refused to deliver them up, saying he would not do it if White came for them himself; and thus the mortgage was not only fraudulently obtained, but fraudulently altered and kept in existence against the wishes of Joseph White. They state also their belief that the mortgage was read to Williams as including only twenty acres; that the mortgage was never proved or acknowledged till after the death of White, and was then proved on the thirtieth day of March, eighteen hundred and thirty-two, before John P. Lewis, one of the complainants, in his character of commissioner, by Stephen Edwards, the subscribing witness; and that on the next day administration of the estate was committed to said Lewis and his co-administrator. They further state, that Lewis has been purchasing up the claims of some of the heirs at law for a few dollars, and that he is attempting a fraudulent speculation.

A replication has been filed, and much testimony taken on both side.

On a careful review of the whole evidence, I am of opinion,

1. That there is not sufficient proof to justify a conclusion that the bond and mortgage were without consideration, and fraudulently obtained.

The notes given at different times by Williams to White, for money borrowed and for interest, formed the consideration of the mortgage. The honesty of these notes is not disputed. The

declarations of White, who is represented to have been an eccentric man, that he did not mean Williams to pay the notes, and that he, Williams, had had a great deal of trouble with him, and other declarations of like character, are all overcome by the fact that Williams afterwards, upon the requirement of White, gave a bond and mortgage for the whole amount. Nor do I see any fraud in the transaction to vitiate it. It is alleged, to be sure, that Williams had been sick, and was still feeble, and that in his weak state he was overcome by the threats of White that he would send him to the court-house if he did not comply. There is proof that he had been sick, and was still weak, though convalescent; but he was able to walk from his own dwelling to the store of Edwards, a distance of half a mile, and remain there a considerable part of the afternoon in the transaction of business. His signatures to the bond and mortgage are written with a remarkably firm and steady hand; and he certainly knew what he had been doing, for in returning home, he called at Daniel Williams's, who was security on one of the notes, and told him he need not be afraid of being security any longer, as he now had it fixed. The testimony of the defendants' witnesses as to the situation of Williams at the time, is very vague and indefinite, and comes far short of proving that he was in such a state as to be unable to attend to plain business, or that he was so alarmed and frightened as not to know what he was doing, and actually forgot that he had a claim against White which would more than meet the claim which White had against him, and therefore that there was nothing due. The allegation in the answer that White threatened to arrest him and send him to the court-house, is not sustained by any kind of proof whatever. The testimony of Stephen Edwards, John Woolley and Joseph H. Doty, repudiates the idea that there was any fraud or contrivance made use of when the mortgage and bond were executed.

2. It is alleged that the mortgage was read as conveying twenty acres, when in fact it conveys forty acres, and four witnesses have sworn to it, viz. Gideon Barker, Britton White, jr.

Walter Curtis, and Drummond White. I am inclined, however, to believe that they are under a mistake. Their testimony in the aggregate is not satisfactory. They appear to have paid but little attention to what was going on, and do not testify in a manner calculated to inspire confidence. Barker says he heard the bond and mortgage read over twice or three times, and is confident the mortgage was read as including only twenty acres, but he cannot recollect any other particular. Again he says, he heard them read once or twice, and he does not know but three times; he does not know whether both papers specified the twenty acres or not, nor can he tell what sum was in them. So Walter Curtis heard the mortgage read, and is sure it was read as for twenty acres; but he knows nothing of the sum for which the mortgage was given; does not remember whether one or two papers were read, but "supposes he heard them all read, as he, Edwards, was long enough reading of them." He heard nothing about the money, when it was to be paid. Britton White, jr. says, Edwards was reading the mortgage when he went in the store; a good many people were there; he did not hear any thing about it, as "to whom it was given from," as he did not pay much attention; only he heard Edwards tell it was for twenty acres as he was reading it. He knows nothing more about it, and cannot say whether there were one or two papers, or for what amount, or to or by whom they were made. Drummond White is very positive it was read so as to include twenty acres of land, and no more. He heard only one paper read; thinks that Edwards was reading, or just beginning to read, when he went into the store. As near as he could tell by the reading of it, it was the mortgage he read. Witness says he did not see the face of the paper; he does not know what sum it was given for, nor when it was made payable, nor whether it was on a whole sheet or a half sheet. He thinks the mortgage was all in writing, and no print. He has good reason to think so; as they would not let Humphrey Williams see it, he tried to look at it himself. He wanted to see what was written, and whether it was correct or not, and he is certain it only read for

twenty acres. It will be seen that the evidence of these witnesses is very loose on this point; and it is not a little remarkable, that without paying any special attention to what was doing, they should all recollect one particular matter and forget every thing else. There is an improbability about it, which is increased by the fact that there could be no motive for such a deception. Twenty acres was just as sufficient for the purpose of security as forty; and if it were not, there is nothing to show any agreement that only twenty acres were to be embraced in the mortgage, or that Williams refused to give more. The answer itself, though by no means a cautious one, sets up no such pretence; and the testimony of Edwards is positive that the instrument was read as it was written; that it was read forty acres, and not twenty acres, as is alleged. I consider the evidence of Edwards as much more weighty than that of casual bystanders, who paid little or no attention to what was done or said, who had no interest in it, and who give their evidence in a spirit not calculated to make a favorable impression on the mind.

If, however, these witnesses should be correct in the matter to which they have testified, and Edwards actually read the mortgage as covering twenty acres only, instead of forty acres, it will not vitiate the instrument unless it is shown to have been done intentionally, with a view to defraud and deceive. This is not shown. The strong presumption is the other way. It is fair to presume, that the instrument was prepared according to the direction of the parties. They came to him for a certain purpose, and must have given him instructions, and known what was to be done. If, then, he prepared the instrument, and in reading it read twenty acres, by mistake, when he should have read forty acres, it will not avoid the instrument. It is as it was intended to be, and no injury is done. I dismiss this part of the defence as untenable.

3. It is insisted that the mortgage was never consummated by delivery; that it was placed in the hands of Edwards as an escrow, and was not to be given up until it was acknowledged by the grantor.

I do not perceive the force of this insistment; for if I rightly understand the facts, the delivery to Edwards could not have been the delivery of an escrow. The mortgage and notes were both left with him, and the notes were not to be given up until the mortgage was acknowledged, and until that time the mortgage was also to remain in his hands.

Generally speaking, when a deed is delivered by the grantor to a stranger, to be delivered to the grantee on the performance of some condition, it is considered an escrow; but in all cases the condition is to be performed by the grantee, and not by the grantor. The grantor has done all that was needful for him, to give complete effect to the instrument; he cannot by any subsequent act or omission or refusal of his, prevent his own deed from being operative. In this case, the act was to be done by the grantor, that is to say, he was to acknowledge the deed, and therefore it cannot be considered as an escrow. The intention of the parties cannot be misunderstood. When the mortgage was executed, there was no officer present competent to take an acknowledgment, and it was agreed that all the papers, the notes, bond and mortgage, should remain in the hands of Edwards until Williams should have an opportunity of acknowledging the mortgage, so that it might be registered, and then it was to be given to White, and the notes to Williams. This arrangement, however, did not put it in the power of Williams to avoid the mortgage by refusing to acknowledge it; and although Edwards might have refused to deliver up the papers either to the one party or the other, the rights of the parties would not have been affected by such refusal.

4. Again, it is strenuously insisted, that the claim of Humphrey Williams, one of the defendants, against the estate of White, for board, &c. should be inquired into in this suit, and referred to a master, as a setoff against the amount of the mortgage.

If there be any valid claim against the estate, it cannot be set off in this suit. This is a proceeding *in rem* against the land, and not against the person of the debtor. The ordinary princi-

ples of setoff, as understood in law or in equity, cannot be applied to cases of this kind. There is no mutuality, and can be none. The real defendant is the land itself; and nothing can be set up against the incumbrance, except payment, which operates directly as a release of the incumbrance, *pro tanto*. This is not a personal action any more than the action of ejectment at law, and in neither, can the defendant be permitted to come into court with an offset. In the present case there would be a peculiar impropriety, if the sale of the equity of redemption is bona fide. For if the claim, supposing one to exist, should be allowed, it would simply relieve the lands in the hands of the purchasers, and could in no way enure to the benefit of the mortgagor, to whom the claim really belongs. This suit might have been brought, according to modern authorities, without making the mortgagor a party to the bill; and if this had been done, surely the other defendants, who are the holders of the equity of redemption, could not have set up by way of offset this personal claim of the mortgagor.

I do not find any thing in the evidence to warrant the belief that it was the agreement of the parties that the claim for boarding, &c. should operate as a payment of the mortgage, *per directum*. The very giving of the mortgage after all the services had been rendered, negatives the idea. If the debt had been actually paid at that time, there was no inducement to give the mortgage, and it was improper to do it. If there be any claim, it cannot be entertained here.

5. There is one other matter to be considered, and that is, the apparent erasure or alteration of the date of the bond.

The instrument was executed, doubtless, on the twenty-fifth day of April, eighteen hundred and thirty-one. The alteration is in the last word of the year. It was either written *three* and altered to *one*, or originally written *one* and altered to *three*. Edwards, the scrivener, cannot account for it. He has no recollection of it whatever. He thinks the word *three* is in his handwriting, but does not think he altered the word *one* to *three*. He says also, that if the alteration was made by him at all, it

was made before the execution of the bond, and in the presence of the parties.

The alteration is apparent. The principle of law admits of no dispute, that when a deed has been altered in an immaterial part, by the person to whom it belongs, after delivery, it will be avoided; and if it be altered in a material part, even by a stranger, the same result will follow. The alteration must be after the delivery: 1 *Shep. Touch.* 69. Where there is no memorandum or note made of the alteration, the time when it was made is a question of fact: *Den* v. *Wright*, 2 *Hals.* 175. The true inquiry in this case is, whether the erasure or alteration was made before or after the execution of the bond.

It is difficult to determine from inspection whether the word *one* or *three* was first written, but I think it evident that both were written by the same hand and pen, and that they were written by Edwards. He thinks the word *three* is in his hand-writing, but says nothing of the word *one*. Being written by him, it must have been before the delivery of the bond; as he states himself that he made no alteration after the papers were executed. If the word *three* was first written by mistake, and altered afterwards to *one*, so as to conform to the truth, as is most probable, the matter is explained. If the *one* was altered to a *three*, it is impossible to account for it, and as the witness says, it must remain a mystery. I do not know that it is important for me to settle this difficulty. I am satisfied, from the appearance of the paper, the hand-writing, and the color of the ink, that the alteration was made by Edwards; and he having sworn that if made by him, it was made before the execution of the instrument, the instrument is not affected by it.

The defendants, in their defence, interposed some other difficulties in the way of recovery; such as, that the mortgage having been proved by the subscribing witness before John P. Lewis, one of the complainants, just before he took out letters of administration, and after it is supposed he had agreed to administer upon the property; and also that James T. White, the other administrator, had purchased the right of one of the next of kin of

the intestate. The facts appear to be true; but they do not avoid the mortgage. The transactions were both legal. Their morality depends upon the good faith of the different parties; and this, the court sees no just ground to question.

Under this view of the case, the complainants are entitled to relief. Let it be referred to a master, in the usual way, to take an account.

Order accordingly.

WARREN HAIGHT and WIFE v. The EXECUTORS of TUNIS BERGH, deceased, and others.

A public officer, acting under the process of this court, will not be restrained for the purpose of aiding the complainant in a proceeding in a court of law, which, in the opinion of the chancellor, is unlawful or unnecessary.

MOTION to dissolve an injunction allowed by one of the masters of the court, for want of equity in the bill. The grounds of the application, so far as they are necessary to an understanding of the case, are stated in the opinion of the chancellor.

Gifford, for defendants, in support of the motion.

De Hart, for complainants, contra.

THE CHANCELLOR. Tunis Bergh was a resident of the city of New-York, and died in August, eighteen hundred and twenty-eight. In September, eighteen hundred and twenty-nine, Warren Haight, being indebted to the estate, confessed a judgment to the executors, in the court of common pleas of Essex county, for two thousand dollars. Execution was issued, and the property of defendant purchased by the executors for the benefit of the estate. John J. Astor held a mortgage on the premises, which was prior to the judgment; and in July, eighteen hundred

and thirty-five, he obtained a decree on his mortgage for a sale of the property to pay nine thousand six hundred and twenty-nine dollars, the amount of the mortgage money. An execution went into the hands of R. O. Robinson, sheriff of Essex, who advertised the property to be sold on the twelfth day of October, and then adjourned the sale to the twelfth day of November. Notwithstanding the adjournment, the property was sold by an auctioneer on the same twelfth day of October, by the consent of the sheriff, and Astor, and the executors; and Robert Morrill became the purchaser. It was then agreed that the executors should account to Astor and secure him for his mortgage money, and that Morrill should account to the executors for the amount of the purchase; and it was so done. Morrill secured to the executors the balance of the purchase money, ten per cent having been paid in cash by the purchaser. Haight and wife then sued out an attachment from the supreme court, and attached these securities in the hands of the executors, to pay a legacy left to the wife of Haight, in the will of Tunis Bergh, who was her father; and, alleging that the parties are now about to set aside the first sale and agreement, and thereby defeat his claim, and that to effect this the sheriff has again advertised the property for sale, whereby the complainants may be injured by the loss of the legacy—he prays an injunction to stay all proceedings on the part of the sheriff, and also general relief. An injunction was awarded by one of the masters.

I am clearly of opinion that the application to set aside the injunction, for want of equity in the bill, must be granted.

If the property attached is to be considered as belonging to the Berghs, in their individual capacities, they are not thereby personally liable to the complainants for the amount of the legacy. There is no devastavit charged in the bill, nor any allegation which can give colour to the idea of personal liability. It is not even charged that a demand has been made and refused. The facts that these executors lived in New-York, the domicil of their testator, and that they are in moderate circumstances and not able to respond in damages for any mal-administration of the

assets of the estate, is not sufficient to warrant any such proceeding against them as is here attempted by the attachment.

If the property attached is to be taken as belonging to the estate, I do not conceive that the complainants are in any better situation. The estate is indebted to Astor to the amount of his debt, and this must be paid. It is only the balance, the value of the equity of redemption, that can in any way be subject to the claim of the complainants. If the securities of Morrill in the hands of the executors are assets to that amount, there is no remedy against the executors by way of attachment. I believe the doctrine is settled at law, that an attachment will not lie against executors either as absconding or nonresident debtors: *McCombe* v. *The Executors of Hudson*, 2 *Dall.* 73; *Jackson* v. *Walworth*, 1 *John. Ca.* 372. And I cannot consider the principle called in question by the mere fact that a party has thought proper to sue out a writ. I apprehend, that by considering that proceeding as contrary to law, I am not interfering with the appropriate jurisdiction or duties of the supreme court. At all events, I am unwilling to lend the extraordinary aid of this court to assist a party in a course at law, which I think unwarranted—the court itself having expressed no opinion to the contrary. This is simply an injunction bill. It asks no other specific relief. I cannot restrain a public officer acting under the writ of this court, for the purpose of aiding the complainants in what I consider an unlawful proceeding in a court of law.

In another point of view, the injunction appears to me unnecessary. If the Berghs really hold the securities from Morrill, as set out in the bill, under the agreement, and the contract was in good faith, and Morrill was actually at the time of serving the attachment indebted to the Berghs, can the relative situation of the parties be changed by any sale the sheriff may make? The complainants have an interest under the attachment, supposing it can be sustained, that cannot be divested, as I conceive, without their consent. The debt is bound by the attachment in the hands of the debtor. If he pay it afterwards, it is no defence against the attachment; and if he change it, and thus en-

deavor to evade the lien of the attachment, the effort must be unsuccessful.

Seeing, then, that the bill seeks no account, nor any aid of this court in compelling payment of the legacy; but only asks the court for an injunction, as auxiliary to proceedings in another court, where such aid is either improper or unnecessary, I have no hesitation in saying, that the injunction must be set aside, as improvidently issued.

There are other grounds on which the court might rest its opinion, but these are deemed sufficient.

Injunction set aside.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

APRIL TERM, 1836.

ABRAHAM T. HILLYER and EUPHEMIA JANE HILLYER v. EZRA AYRES, Acting Executor of ENOCH DUNN, deceased, ELIZA DUNN, GEORGE DUNN, and ENOCH L. DUNN.

A testator by his will gave to his son Enoch one thousand dollars, to be paid at the death of the testator; to his daughter Eliza one thousand dollars, to be paid at the age of twenty-one; and to his daughter Catharine fifteen hundred dollars, also to be paid at the age of twenty-one; and added, "if any of my before named children should decease before he or she shall attain the age of twenty-one years, without lawful issue him or her surviving, then his or her said legacy shall lapse and form a part of the residue of my estate, to be distributed among my surviving children as herein after mentioned." He then gave to his daughter Euphemia seven hundred dollars, in addition to three hundred dollars he had previously given her. The will then contains the following clauses: "As to all the rest and residue of my estate, I give and bequeath the same unto my said son Enoch, and my said daughters Eliza and Catharine, in equal shares to be divided among them; but in case my said daughters, or either of them, (who are now minors,) shall decease before they attain the age of twenty-one years, without lawful issue them surviving, the part of her or them so deceased shall lapse into the general fund of my estate, to be divided as aforesaid among the survivors of them. And my further will is, that although I have heretofore given and advanced to my oldest son George, the sum of twenty-five hundred dollars, which I suppose is at least as much if not more than will come to my other children under this my will, yet, nevertheless, if it shall so happen by the lapse of any legacies or legacy herein before mentioned or intended to be given as aforesaid, or from other

causes so augmenting the residue of my estate that there shall be a surplus after distributing to my other children in manner aforesaid, so much as shall make their respective shares, taken with their aforesaid legacies, respectively, amount to the sum of twenty-five hundred dollars, then my son George shall come in for a share with my other children." After the death of the testator, Catharine, one of his daughters, died under the age of twenty-one, and without lawful issue her surviving. *Held*,

1. That Euphemia is not entitled to an equal share of the residue with Enoch, Eliza, and Catharine.
2. That she is not entitled to an equal share with Enoch and Eliza, of the legacy of Catharine, which by her death fell into the residue.
3. That she is not entitled to an equal share with Enoch and Eliza, of Catharine's share of the residue, which by her decease fell into the estate.

THE bill in this cause was filed in the name of a feme covert, (claiming to be a residuary legatee under the will of her father, Enoch Dunn, deceased,) and of her husband, against the acting executor of the will, and the other residuary legatees therein named, for the recovery of certain residuary legacies under the will. To this bill a general demurrer was filed, and the cause was heard upon the demurrer.

E. Wood, for the defendants, in support of the demurrer.

Disborough and *I. H. Williamson*, for complainant, contra.

THE CHANCELLOR. Enoch Dunn, late of the county of Middlesex, died in eighteen hundred and thirty-one, leaving a last will and testament duly executed to pass real estate; and Ezra Ayres, one of the executors, proved the will in the usual form. The testator directed all his real estate to be sold and converted into personalty; and gave to his wife five hundred dollars and all the furniture. He also gave her the interest of one third of all the rest of his estate during widowhood; if she married, that annuity was to cease, and in lieu thereof she was to receive five hundred dollars. He then gave to Enoch, his son, one thousand dollars, to be paid to him at the decease of testator; to Eliza, his daughter, one thousand dollars, to be paid at the age of twenty-one; and to Catharine, fifteen hundred dollars, also

to be paid at the age of twenty-one; and added, "if any of my before named children shall decease before he or she shall attain the age of twenty-one years, without lawful issue him or her surviving, then his or her said legacy shall lapse and form a part of the residue of my estate, to be distributed among my surviving children, as herein after mentioned." He then gave to his daughter, Euphemia Jane Hillyer, one of the complainants, seven hundred dollars, in addition to three hundred dollars he had given her before. Then occurred the following clauses: "As to all the rest and residue of my estate, I give and bequeath the same unto my said son Enoch, and my said daughters Eliza and Catharine, in equal shares to be divided among them; but in case my daughters, or either of them, (who are now minors,) shall decease before they attain the age of twenty-one years, without lawful issue them surviving, the part of her or them so deceased shall lapse into the general fund of my estate, to be divided as aforesaid among the survivors of them. And my further will is, that although I have heretofore given and advanced to my eldest son, George, the sum of twenty-five hundred dollars, which I suppose is at least as much, if not more, than will come to my other children under this my will, yet, nevertheless, if it shall so happen by the lapse of any legacies or legacy herein before mentioned or intended to be given as aforesaid, or from other causes so augmenting the residue of my estate, that there shall be a surplus after distributing to my other children in manner aforesaid, so much as shall make their respective shares, taken with their aforesaid legacies, respectively, amount to the sum of twenty-five hundred dollars, then my son George shall come in for a share with my other children."

After the death of the testator, Catharine, one of the daughters, died, under the age of twenty-one, and without lawful issue her surviving.

Hillyer and wife, who file their bill in this case, admit the payment of the specific legacy of seven hundred dollars; but they claim to be entitled, under the will and the contingency that has happened, to portions of the estate still in the hands of

the executor. In the first place, they claim to be entitled, in right of the wife, to an equal share of the residuum of the estate with Enoch, Eliza and Catharine; that is to say, the one fourth part of the residuum of the estate, after deducting the specific legacies and the allotment to the widow. In the next place, they claim of the legacy of Catharine, which fell into the residuum by her death, an equal share with Enoch and Eliza; that is to say, the one third part. And lastly, they claim one third part of Catharine's share of the residuum which by her decease fell into the estate. Alleging the estate to be unsettled, they pray an account, and such relief as they may be entitled to.

To this bill there is a general demurrer.

The will is not without its difficulties; but they do not apply to every part of it. They have no reference to the first claim set up by the complainants. This is, as I conceive, entirely without foundation. The original residuum, by which I mean the residue of the estate after the payment of all the legacies, is expressly given by the will to Enoch, Eliza and Catharine, in equal shares to be divided among them; and I have not been able to discover upon what pretence a claim can be made by the complainants to any part of it. As to this, the will is as plain as language can make it. The residuum is to be divided into three parts, and to go to three persons, who are expressly named.

2. The second claim is to an equal share with Enoch and Eliza of the legacy of fifteen hundred dollars. In this there would seem to be a difficulty, but on consideration I am of opinion the claim cannot be supported.

The will directs, that in case of the death of Catharine, Enoch or Eliza, under twenty-one years and without issue, the legacy of the one so dying shall lapse and form a part of the residue of his estate, "to be distributed among my surviving children as herein after mentioned." It was, then, to fall into the residuum of the estate; and it was to be divided among the surviving children as the residuum was afterwards directed to be divided. There is no other express direction for the division of the residuum than the one already referred to. It is to be divided among

the three, Catharine, Enoch and Eliza; and Catharine having died, her legacy is to go to the survivors who take the residuum. The expression, "among my surviving children," is qualified by the context. It is to be distributed, not absolutely among all his surviving children, but is made to form a part of the residue of the estate, and is to be divided among the surviving children "as herein after mentioned." Taking this clause in connection with the clause which directs the distribution of the residue, and it is evident that the testator meant to limit the expression to the survivors or survivor of the three whose legacies were limited over, and to whom he also expressly gave the residue of the estate; that is, Enoch, Eliza and Catharine. Mrs. Hillyer's legacy is not limited over. It can by no possibility form a part of the residuum of the estate.

3. Catharine having deceased, the complainants claim also a proportion of her share of the residuum of the estate. In such claim I think there is no just ground. The residuum is given to three of the children by name. Eliza and Catharine being minors, the will provides that in case they, or either of them, shall die under age and without issue, the part of her or them so deceased shall lapse into the general fund of the estate, "to be divided as aforesaid among the survivors *of them*." What survivors are here meant? I think, without doubt, the survivors of those to whom the residuum was given by name, and in express terms.

Taking this clause by itself, it can admit of no other construction; and taking those parts of the will which refer to the legacies and to the residuum, and to the mode of distribution, whether with or without any lapse, and it appears to me no one would hesitate to say, it was the intention of the testator that Enoch, Eliza and Catharine, or the survivors or survivor of them, should have the legacies given to them and also the residuum. If either of the legacies lapsed, it was to go into the residuum, and to be divided among his surviving children as afterward[illegible] mentioned. The residuum was to be divided among three; and in case of a lapse as to a part of the residuum, the whole was t[illegible]

be divided among the survivors. There is in this no inconsistency; and if it were not for the next clause of the will, no serious question could be raised. That provides for a contingency which was supposed by the testator to be barely possible. After stating that George had received twenty-five hundred dollars, which he supposed to be at least as much, if not more, than would come to his other children under the will, he directed that if it should so happen by the lapse of any legacy or legacies, or from other causes augmenting the residuum of the estate, that there should be a surplus after distributing to his other children in manner aforesaid, so much as should make their respective shares, taken with their aforesaid legacies respectively, amount to the sum of twenty-five hundred dollars, then his son should come in for a share with his other children.

This clause, though it relates to a remote contingency, or what the testator appeared to consider a bare possibility, must be taken into view in construing this will. The intention of the testator is to be collected from the whole instrument, and not from detached parts; and the different portions are to be reconciled, as far as possible. In this case I have not been able to make them harmonize entirely.

It would seem, from a cursory view of this clause, that the testator intended to make all his children equal. Yet this is at variance with the whole structure of the will, and with its most positive directions. The testator, in the very commencement of the will, sets out with a different principle. He gives to three of his children one thousand dollars each, and to a fourth one fifteen hundred dollars. Here is an inequality about which there can be no possible dispute. Then again he directs that the residuum of the estate shall be divided among three, expressly excluding the fourth one, and the legatee who receives fifteen hundred dollars is one of the three to whom the residue is given. Here is another, and a still greater inequality. If there had been no lapse, no question could have been made as to the intention of the testator; and yet the estate would have been very unequally distributed. It is plain, then, that the testator did not

intend that his estate should, at all events, be equally divided among all his children.

Nor can there be an equality, if the claims of Euphemia Jane should be allowed, unless she can come in for a share of the residuum, which I think impossible; and in truth it was abandoned on the argument. For if she is entitled to an equal share of the legacy, and an equal part of Catharine's lapsed share of the residuum, she would only receive the one ninth part of the whole residue, while the other two receive four ninth parts each. This produces no equality, such as appears to be contemplated by the clause now under consideration. It shows that the different parts of the will cannot be reconciled upon the ground taken by the complainant.

Still the clause is not to be considered as nugatory and rejected altogether, provided it be susceptible of any reasonable construction. If we suppose the testator to have meant, that if those of his children to whom he had given legacies and residuary shares which were liable to lapse, should by reason of such lapsing and consequent accumulation, be entitled, under the mode of distribution adopted by the will, to receive more than twenty-five hundred dollars each, then the overplus should be shared by them and George equally; the difficulty, if not removed, is greatly obviated. And, taking the whole instrument together, I think this the most reasonable construction that can be adopted.

The testator says, "if there should be a surplus, after distributing to my other children in manner aforesaid, so much as shall make their respective shares, together with their aforesaid legacies respectively, amount to the sum of twenty-five hundred dollars," &c. The phrase, "distributing to my other children in manner aforesaid," refers, necessarily, to the mode in which the residuum is to be distributed. It can refer to nothing else; and we have already seen that as to that part of the will there is certainty. The term "other children," used in this clause, must be taken in the same connection, and be considered as referring to those other children to whom the residuum had been given. And this may be done without any violence to language, and in

consistent with those parts of the will about which there is no dispute. This construction will deprive Euphemia Jane, the complainant, of any interest in the will except the original legacy of one thousand dollars; and I would willingly avoid it, if I could; but I cannot consent to give greater weight to the uncertain and doubtful parts of a will, than to those which are clear and free from ambiguity. It would be unsafe and dangerous in principle, and in this instance would make the whole instrument incongruous and uncertain.

Demurrer allowed.

JEROMUS V. D. B. VANDOREN and PETER VANDOREN v. JAMES W. TODD, PHILIP VANARSDALEN, LAWRENCE V. STUDDIFORD, Surviving Executor of PETER STUDDIFORD, deceased, The NEW-BRUNSWICK FIRE INSURANCE COMPANY, and RANDOLPH TITUS.

The vendor of real estate has a lien in equity upon the estate sold, for the purchase money.

The lien exists without any special agreement for that purpose, and it remains with the purchaser to show that from the circumstances of the case it results that the lien was not intended to be reserved.

The fact that the period of payment is dependent on the life of another person, will not affect the lien.

Nor will the lien be affected by the vendee giving his bond with security, where the security does not appear to have been given in pursuance of the contract, but upon the voluntary offer of the vendee.

That the purchaser was a man of property when he made the purchase, will not defeat the lien.

The lien will be enforced against the vendee and all persons claiming under him with notice of the equity.

So persons holding the bargained premises under an assignment made by an insolvent debtor, or by virtue of a conveyance from the assignee, will hold subject to the lien, though without notice of the incumbrance.

An assignment by operation of law passes the rights of an insolvent in the same plight and condition that he possessed them.

[Vandoren v. Todd et al.]

Persons taking under an assignment by operation of law, are not considered purchasers for a valuable consideration, in the proper sense of the words.

No person is entitled to the protection afforded to a bona fide purchaser for a valuable consideration without notice, without having made actual payment of the purchase money.

THE complainants, in their bill of complaint, set forth, that their father, Joseph Vandoren, late of the county of Somerset, was seized at the time of his death of a large and valuable real estate, consisting of divers tracts of land, particularly described in said bill; that being so seized thereof, he departed this life intestate, about the year eighteen hundred and one, leaving Sarah Vandoren his widow, and four sons and three daughters his heirs at law, most of whom, including the complainants, were at the time of their father's death, minors under the age of twenty-one years. That Sarah Vandoren, the widow of the said intestate, together with a part of his children, continued to occupy the homestead farm until about the month of March, A. D. eighteen hundred and fourteen, when Peter Vandoren, one of the complainants, and the youngest of the said heirs, attained the age of twenty-one years; at which time the said real estate was sold at public vendue, and purchased by the complainants, for eighteen thousand dollars, including the widow's right of dower therein; and that in pursuance of the said sale, the other children and heirs at law of the said intestate, by deed dated on the thirty-first day of May, A. D. eighteen hundred and fourteen, conveyed their respective shares in the said real estate to the complainants. That at the time of the delivery of the said deed, it was agreed between the complainants, and the other heirs at law, and Sarah Vandoren the widow of the said intestate, that the complainants should pay to the other heirs their legal shares and proportions of the sum of twelve thousand dollars—being two thirds of the purchase money—and that the remaining six thousand dollars, or one third of the said purchase money, should remain in their hands as a lien on the said lands, as and for the dower right of the said widow, during her natural life; the interest thereof to be paid annually by the complainants to her,

and on her death the principal to be divided amongst the heirs in proportion to their respective rights therein—the sons taking two shares each, and the daughters one share each. That in pursuance of said agreement, the complainants paid to the other heirs their respective proportions of the said sum of twelve thousand dollars, and entered upon and continued in the possession of the said lands and premises, until the seventh day of May, A. D. eighteen hundred and fifteen, when the complainants gave their joint bond to the said widow, in the penal sum of twelve thousand dollars, conditioned for the payment to her of the sum of four hundred and twenty dollars, (being the interest of six thousand dollars at seven per cent.) annually during her natural life; and also their joint bond to each of the other heirs, conditioned for the payment to them of their respective proportions of the said sum of six thousand dollars on the death of the said widow—leaving the sum of twenty-four hundred dollars, the proportion of the said sum of six thousand dollars to which the complainants were entitled, unsecured otherwise than by their investment in said premises, the complainants being the owners thereof; which said several bonds were afterwards secured by a mortgage given by the complainants, bearing date on the twenty-first day of March, A. D. eighteen hundred and sixteen, upon a part of the said lands, containing about eighty acres, with the mills, buildings and improvements thereon, known as the mill tract. That on the twenty-third day of March, in the year last aforesaid, the complainants sold the said eighty acre tract, subject to the said mortgage, to Philip Vanarsdalen, for eighteen thousand dollars, and conveyed the same to the said Philip Vanarsdalen in fee, by deed bearing date on that day; that by the terms of the sale, the said Philip Vanarsdalen was to pay the complainants twelve thousand dollars, being two thirds of the purchase money, and the balance, or six thousand dollars, was to remain an incumbrance on the lands so conveyed, until the death of Sarah Vandoren—the said Philip Vanarsdalen paying the interest therefor to the said widow during her life, and on her death to pay the principal to the complainants, to be distributed

among the heirs at law according to the original agreement among them; and that in pursuance of the said agreement, the said Philip Vanarsdalen executed to the complainants a bond conditioned for the payment unto the complainants of four hundred and twenty dollars annually on the first day of May, during the natural life of the said Sarah Vandoren, widow of the said Joseph Vandoren, deceased, and the sum of six thousand dollars within one month after her decease. That the intention of the said arrangement was, that the six thousand dollars should remain a lien on the said premises until after the death of the said Sarah Vandoren.

The bill further states, that the said Philip Vanarsdalen took possession of the said premises, and continued to hold and enjoy them, paying annually to the complainants the interest on his bond, until the thirteenth day of November, eighteen hundred and eighteen, when he sold and conveyed the premises in fee simple to Daniel Latourette; that Latourette purchased with full knowledge that the sum of six thousand dollars was a lien upon the said premises, and took title subject to the said lien. That on the eighteenth day of March, eighteen hundred and twenty, the said lands were sold by the sheriff of the county of Somerset, by virtue of a writ of fieri facias against the said Daniel Latourette, and were again purchased by the said Philip Vanarsdalen; that the said last mentioned sale, and conveyance in pursuance thereof, was made subject to all legal incumbrances, and that the said Philip Vanarsdalen knew that the said sum of six thousand dollars was an incumbrance thereon. That in the year eighteen hundred and twenty-one, the said Philip Vanarsdalen having become embarrassed, executed a deed or assignment of the said lands to Peter Studdiford, of the nature or contents of which the complainants are ignorant. That on the eighteenth day of March, the said Peter Studdiford, assignee of said Philip Vanarsdalen, sold and conveyed the said lands to Cornelius Vanhorn, who, by deed dated the first day of May thereafter, reconveyed the same in fee to the said Peter Studdiford. That no money consideration passed between the parties for the two last men-

tioned conveyances, or if there did, that the said conveyances were made with a full knowledge of the said lien.

That the said Peter Studdiford, having acquired a title to the said lands, and having recognized the said incumbrance of six thousand dollars by paying the interest thereof from year to year, departed this life in the year eighteen hundred and twenty-six, having executed his last will and testament in due form of law to pass real estate. That the executors therein named having proved the said will, sold the said lands at public vendue, on the thirteenth day of February, eighteen hundred and twenty-seven, to George G. Hall and James W. Todd, subject to a mortgage of six thousand dollars to Sarah Vandoren, and afterwards conveyed the same to the said purchasers in pursuance of the said sale.

That at the time of the last payment on said property to the executors of Studdiford, excepting the mortgage of six thousand dollars, a doubt being suggested by the said executors whether the twenty-four hundred dollars claimed by the complainants could be claimed by them, as the same was not included in the said mortgage, a special agreement was entered into between the executors of Studdiford, and Todd and Hall the purchasers, by which, among other things, it was distinctly stated, that the twenty-four hundred dollars, the right to which was disputed, formed a part of the said mortgage of six thousand dollars.

The bill further states, that the said George G. Hall afterwards died intestate; that letters of administration were granted to the said James W. Todd, by whom, as administrator as aforesaid, the undivided half part of the said lands were, on the thirtieth day of March, eighteen hundred and twenty-nine, conveyed to one Cornelius T. Beekman, by whom the same were reconveyed, on the thirty-first day of the same month of March, to the said James W. Todd; by means whereof Todd became seized in fee of the said lands in severalty, subject to the payment of four hundred and twenty dollars per annum to the said Sarah Vandoren during her life, and also to the payment of the said sum

of six thousand dollars after her death to the heirs of the said Joseph Vandoren, deceased.

The bill further states, that two of the executors of Peter Studdiford have died, leaving Lawrence V. Studdiford the sole surviving executor; that Sarah Vandoren, the widow of the said Joseph Vandoren, died on the tenth day of November, eighteen hundred and thirty-four; that thereby the said sum of six thousand dollars became due to the heirs at law of the said Joseph Vandoren on the tenth day of December, eighteen hundred and thirty-four; and that the said sum of twenty-four hundred dollars, part of the said sum of six thousand dollars, then became due and payable to the complainants from the said James W. Todd. That on the sixteenth day of January, eighteen hundred and thirty-five, the said James W. Todd mortgaged the premises to the New-Brunswick Fire Insurance Company, to secure the payment of six thousand dollars; and that he has paid and satisfied all the interest due to Sarah Vandoren, the widow of Joseph Vandoren, and also the sums due to all the other heirs except the complainants; and also that he has contracted in writing to sell and convey the said premises to one Randolph Titus, for nineteen thousand dollars.

The bill prays that Todd, the defendant, may be decreed to pay to the complainants the said sum of twenty-four hundred dollars, with interest thereon from the tenth day of December, eighteen hundred and thirty-four, or that in default thereof the defendants may be foreclosed of and from all equity of redemption in the said lands and premises; that the said lands and premises may be sold, and that out of the proceeds the complainants may be paid the full amount of said principal and interest, with costs.

Separate answers were filed by Todd, Vanarsdalen and Studdiford's executor, three of the defendants; and the cause came on for hearing upon the bill, answers, replications and proofs.

The chancellor having been of counsel with one of the parties, the cause was heard by his direction before Elias Vanarsdalen, esquire, one of the masters of the court.

Nevius and *T. Frelinghuysen*, for complainants.

Hartwell, *W. Thomson* and *Scott*, for defendants.

THE MASTER. The matter in controversy in this suit, is twenty-four hundred dollars and interest, which became payable after the death of Sarah Vandoren, the widow of Joseph Vandoren, of the county of Somerset, who died intestate in the year of our Lord eighteen hundred and one, leaving several sons and daughters his heirs at law. In March, in the year of our Lord eighteen hundred and fourteen, after the youngest child arrived at full age, the real estate of the said intestate, consisting of a farm, with mills thereon, and which is frequently called the mill property, and a lot of woodland, was sold at public vendue, and purchased by Jeromus V. D. B. Vandoren and Peter Vandoren, two of the said sons, for the sum of eighteen thousand dollars. One third of the purchase money, being six thousand dollars, was to remain on interest, at seven per cent. and be paid to the widow, during her life, in lieu of her dower, and the principal to be divided, one month after her death, among the children of the intestate, according to law, viz. one share to each daughter, and two shares to each son. The complainants afterwards gave a mortgage on the same to the widow, to secure the sum of four hundred and twenty dollars yearly, being the interest of the said six thousand dollars; and to secure to the other heirs their shares, amounting to three thousand six hundred dollars, according to bonds given for their proportions thereof—no mention being made in said mortgage of the balance of the said six thousand dollars, which was the two thousand four hundred dollars, the proportions belonging to the complainants.

In March, in the year of our Lord eighteen hundred and sixteen, the complainants sold and conveyed the farm to Philip Vanarsdalen, for about nineteen thousand dollars; of which purchase money six thousand dollars was to remain until after the death of the said widow, and for which the said Philip Vanarsdalen gave his bond to the said complainants, in the penal sum of

twelve thousand dollars, conditioned to pay the complainants four hundred and twenty dollars, on or before the first day of May, in the year of our Lord eighteen hundred and seventeen, and the like sum of four hundred twenty dollars, on or before the first day of May in every succeeding year, during the natural life of the said widow, and the sum of six thousand dollars within one month after her decease. Philip Vanarsdalen possessed the farm, and paid the interest on his bond, until in November, in the year of our Lord eighteen hundred and eighteen, when he sold and conveyed the said farm to Daniel Latourette, for about nineteen thousand dollars, subject to a lien of six thousand dollars, to be paid to the heirs of Joseph Vandoren upon the death of their mother, which was considered a part of the purchase money, and deducted from it; and when it was afterwards, in the year of our Lord eighteen hundred and twenty, sold by the sheriff as the property of the said Daniel Latourette, it was sold subject to the said six thousand dollars, and purchased again for one hundred and fifteen dollars, by the said Philip Vanarsdalen; who afterwards, in eighteen hundred and twenty-one, became embarrassed in his circumstances, and the said farm was assigned and conveyed by him to Peter Studdiford, who held and claimed the same as assignee of the said Philip Vanarsdalen, an insolvent debtor, appointed by the court of common pleas of the county of Somerset, as is set forth in his deed, dated March eighteenth, eighteen hundred and twenty-two, to Cornelius Vanhorn; in which last mentioned deed, in consideration of nine thousand dollars, the said Peter Studdiford conveyed the said farm to the said Cornelius Vanhorn—who reconveyed the same to the said Peter Studdiford, for the consideration of nine thousand dollars, by deed dated the first of May, eighteen hundred and twenty-two; besides the same consideration, both deeds are acknowledged before the same master in chancery, on the same day, and on the same day left in the clerk's office to be recorded.

It does not appear that this conveyance and reconveyance was for any other purpose than to vest in the said Peter Studdiford the title to the said farm, to be held as purchaser thereof, and not as

assignee of the said Philip Vanarsdalen. In eighteen hundred and twenty-six, Peter Studdiford departed this life; and in eighteen hundred and twenty-seven, Lawrence V. Studdiford, Cornelius Vanhorn and John Frelinghuysen, executors of the said Peter Studdiford, deceased, sold and conveyed the said farm and mills to George G. Hall and James W. Todd, for eleven thousand two hundred and ninety dollars, as set forth in their deed for the same. The said George G. Hall having died intestate, his undivided moiety or half of said farm was sold by his administrator, the said James W. Todd, to Cornelius T. Beekman, by deed dated March the thirtieth, eighteen hundred and twenty-nine, and he, by deed dated the day following, conveyed the same undivided moiety to the said James W. Todd. Two of the executors of the said Peter Studdiford are since dead; and the said widow of Joseph Vandoren also died November tenth, eighteen hundred and thirty-four.

It is charged in the bill, that the said James W. Todd mortgaged the said farm and mills to the New-Brunswick Fire Insurance Company; and also, that he agreed to sell the same to Randolph Titus.

Separate answers have been put in to the complainants' bill, by Philip Vanarsdalen, Lawrence V. Studdiford surviving executor of Peter Studdiford, and by James W. Todd; to which replications have been filed, and several witnesses examined, and exhibits made. As to the other defendants, no answers have been filed. Peter Vandoren, one of the complainants, having died, an order was made, in October last, that his administrators, Henry H. Wilson and Sarah Vandoren, be made complainants in this suit, in the place of the said Peter Vandoren.

By an order of this court in April, eighteen hundred and thirty-five, the complainants' bill appears to have been taken as confessed against the said James W. Todd, Peter Vanarsdalen, (no doubt intended for Philip Vanarsdalen,) Lawrence V. Studdiford, surviving executor of Peter Studdiford, deceased, and Randolph Titus. So far as regards the defendants who have filed answers, this decree may be considered irregular or waived;

and as respects the defendants, the New-Brunswick Fire Insurance Company, no process of subpœna appears to have been issued, nor have they appeared to the complainants' said bill, nor was any objection taken thereto on the hearing by the other defendants. As the disputes between the other defendants and the complainants may be decided without the said Fire Insurance Company being parties, any discovery or relief as against them may be considered as waived by the said complainants, and their bill as respects the said Fire Insurance Company, must be dismissed out of this court, without prejudice to the right of any party in this suit: 2 *Atk.* 296; 3 *Atk.* 400.

By the articles of vendue for the sale of the real estate of Peter Studdiford, the farm in question was sold subject to a mortgage thereon of Mrs. Sarah Vandoren, of six thousand dollars. By a subsequent agreement in writing, bearing date October eighteenth, eighteen hundred and twenty-seven, executed by the executors of the said Peter Studdiford and the said James W. Todd, it is among other things stated, that the said farm was purchased for eleven thousand two hundred and ninety dollars, of which six thousand dollars was a mortgage on the property in favor of the widow Sarah Vandoren. It further states; "and whereas difficulties have arisen in relation to a part of the amount of said mortgage, that is to say, the sum of twenty-four hundred dollars, whether, after the death of the said Sarah Vandoren, the said sum is to be paid to the estate of the said Peter Studdiford, or to Jeromus V. D. B. Vanderen and Peter Vandoren, two of the heirs of the estate of Joseph Vandoren, deceased, both parties having made known their intention to claim the same." The writing then certifies, "that the sum of twenty-four hundred dollars is a part of the incumbrance of six thousand dollars mentioned in the conditions of sale, and part of the sum of eleven thousand two hundred and ninety dollars mentioned in the said conditions as the purchase money, and that the property is liable for the same after the death of the said Sarah Vandoren, to whomsoever may be lawfully entitled to the same." And among other things in the said writing set forth, "it was expressly stipulated on the part of

the said James W. Todd, that he does not by this instrument intend to recognize in any manner of way, any right of either party, or himself and partner, to said sum of twenty-four hundred dollars; but that he simply means to have it understood, that the sum alleged to be in controversy is a part of the six thousand dollar mortgage or incumbrance mentioned in the articles of sale, and part of the purchase money, and that the property is liable for the same, upon the death of the said Sarah Vandoren, to any person who may be legally entitled." The farm purchased as aforesaid, is thereby admitted by the said James W. Todd to be liable, without dispute, for the twenty-four hundred dollars in controversy, to whomsoever is entitled to that money.

Upon examining the accounts of the executors of the Rev. Peter Studdiford, the second item of charge is, "To amount of sale of mill property, seventy-eight acres, to James W. Todd, subject to the payment of the interest on six thousand dollars thereof at seven per cent. until the death of Sarah Vandoren, and then to be paid accountants to redeem mortgage, eleven thousand two hundred and ninety dollars;" and the first item on the credit side of said account is, "By amount retained for widow Sarah Vandoren, interest on mortgage, six thousand dollars." After deducting the allowances to the executors from the charges against them, there is not sufficient to satisfy the claims of creditors exhibited under oath, but leaves the estate insolvent more than two thousand dollars; and by the orphans' court the estate is declared insolvent, and the executors are for ever discharged from any further claim than a dividend pro rata for creditors.

From these proceedings it plainly appears that the executors, the surrogate, and the court, considered the six thousand dollars deducted as not belonging to the estate of Peter Studdiford, deceased. If, however, such incumbrance existed only as to thirty-six hundred dollars, whether the twenty-four hundred dollars balance would belong to his creditors or the creditors of Philip Vanarsdalen, could not be determined without further proceedings and proofs, inasmuch as there is no new assignee of the said

Philip Vanarsdalen before the court, (*Rev. L.* 762,) which would be necessary to prevent all further disputes respecting the same; nor have the proceedings of the said Philip Vanarsdalen as an insolvent debtor, or articles of vendue of his assignee the said Peter Studdiford, deceased, or his will, been given in evidence in this cause. In the view taken of the subject, however, the balance belongs to none of the said creditors.

In the articles of vendue, it is said to be a mortgage of Mrs. Sarah Vandoren of six thousand dollars. In the articles of agreement aforesaid, it certifies that the sum of twenty-four hundred dollars is part of the incumbrance of six thousand dollars mentioned in the conditions of sale. In the charge against the executors for the amount of sale, it is subject to the payment of interest on six thousand dollars thereof at seven per cent. until the death of Sarah Vandoren, and then to be paid accountants to redeem mortgage; and in the credit, is amount retained for widow Sarah Vandoren, interest on mortgage, six thousand dollars.

From the various modes of referring to this incumbrance, its amount is always the same, but to whom it is due is variously stated. To entitle the complainants to recover, they ought to establish that six thousand dollars was a lien or incumbrance on the farm when they sold it to Philip Vanarsdalen, which continued until purchased by the defendant Todd, of which the twenty-four hundred dollars in controversy is the part due to them. There was of record the mortgage to secure the interest to Sarah Vandoren during her life, and after her death to secure several sums to persons therein named, amounting to thirty-six hundred dollars, which have been paid, being the shares of the other heirs of the said Joseph Vandoren, and are no longer in controversy, and were the mortgage and bonds given by Jeromus and Peter Vandoren while they owned the farm; when they sold it to Philip Vanarsdalen, they took his bond for six thousand dollars, as before mentioned, for part of the purchase money. This bond still remains unpaid, except so far as the payment of interest and thirty-six hundred dollars, as before mentioned, is considered a satisfaction, leaving twenty-four hundred dollars still due thereon

to the complainants; and if Philip Vanarsdalen was prosecuted on his bond, it is not perceived that he could make any defence as respects the payment thereof. This twenty-four hundred dollars, so due, is part of the unpaid purchase money on the sale of the said farm to Philip Vanarsdalen; and without paying the same the contract was not complete on his part, and that money remained a lien on said farm at and after the sale thereof. In respect to the unpaid consideration money, the vendee is held to be a trustee for the vendors. Prima facie, the lien exists without any special agreement for that purpose, and it remains with the purchaser to show that, from the circumstances of the case, it results that the lien was not intended to be reserved: 4 *Kent's Com.* 152, 2d edition.

The lien for unpaid purchase money on the sale of real estate, appears to have been recognized and enjoined in chancery in many cases. In *Mackreth* v. *Symmons*, 15 *Ves.* 329, is a decision by lord Eldon, that the vendors have a lien for unpaid purchase money against the vendee and others with notice, containing an elaborate investigation of the cases on this subject, and to which I refer to save a review of them. In *Grant* v. *Mills*, 2 *V. and B.* 306, the doctrine respecting the vendor's lien was not disputed. See also *Hughes* v. *Kearney*, 1 *Sch. and Lef.* 135. In ex parte *Peak in re Lightoller*, 1 *Mad. R.* 196, the vice chancellor says, "A great variety of cases establish it as a clear equity, that a vendor has in all cases a lien upon the estate sold for the purchase money, unless there has been a special agreement extinguishing that equity." In *Winter* v. *Ld. Anson*, 3 *Eng. C. R.* 496, part of the consideration money was secured by bond with interest at four per cent. and so to remain during the life of the vendor. On appeal from the vice chancellor's decision that the lien was discharged, the lord chancellor says, "The circumstance that the money was to be paid at a future day, does not affect the lien." "I do not think that the lien is affected by the fact of the period of payment being dependent on the life of the vendor." The period of payment in this case being dependent on the life of the vendor's mother, does

not alter the lien. I consider that the lien for unpaid purchase money, is now the established law in England; and the same doctrine has been recognized and established in *Garson* v. *Green*, 1 *John. Chan. R.* 308; 9 *Cowen*, 316; 1 *Paige*, 20; 3 *Paige*, 513; 4 *Kent's Com.* 152. In *Gilman* v. *Brown et al.*, 1 *Mason*, 212, justice Story says, it can hardly be doubted that the doctrine of lien was borrowed from the civil law; and considers the law as settled as between vendor and vendee, and all claiming under the latter with notice of the non-payment of the purchase money: 4 *Wheat.* 255, s. c.

But it is objected to this lien, that the purchaser gave his bond for the six thousand dollars, and thereby extinguished the lien. In 2 *V. and B.* 306; 1 *Mad. R.* 346; 1 *Sch. and Lef.* 135; 3 *Eng. C. R.* 495; 1 *John. Chan. R.* 308; it was held, that taking the bond, bill or note of the vendee did not discharge the lien; and in 4 *Kent's Com.* 153, 154, (n. b.) the better opinion is, that taking a note, bond or covenant from the vendee, for the payment of the money, is not of itself an act of waiver of the lien, for such instruments are only the ordinary evidence of the debt.

That Philip Vanarsdalen was a man of property when he made that purchase, does not appear from any case cited to be sufficient to defeat the lien; nor in case, as he states in his answer, that in one of the bonds he gave security, when it does not appear to have been in pursuance of his contract, ought the lien to be affected, when he further states that the giving the security was his own voluntary offer.

Although this lien is an invisible trust, known only to the vendor and vendee and those that have notice, and is not without its difficulties, yet there seems to be that natural justice and equity which ought to induce the court to enforce it, especially in cases where the parties understood it, and no one is defrauded thereby.

Upon an examination of the testimony taken in the cause, much important evidence is given tending to prove the existence of this lien, and the actual knowledge thereof by the purchasers of the property in question. The deposition of Sarah Schenck,

one of the daughters of the said Joseph Vandoren, deceased, proves the sale in eighteen hundred and fourteen to Peter and Jeromus, and that six thousand dollars was to remain on interest, and be paid as before stated. The same witness further says; Her brothers sold the property to Philip Vanarsdalen in eighteen hundred and sixteen. After stating the possession of her mother and Latourette, the witness further says; "The Rev. Peter Studdiford became the purchaser of said premises, under whose purchase the sum of six thousand dollars was to remain on said property." It appears from the same deposition, that after the defendant, Todd, purchased from the executors of Studdiford, and a bond was demanded for twenty-four hundred dollars for the benefit of Studdiford's creditors, Todd said, likewise, that it did not belong to the estate of Mr. Studdiford, but to deponent's two brothers; and Todd would not give such an instrument, he, Todd, saying, "it was their (Peter and Vanderbilt's, the complainants') just due, and belonged to no one else." And the witness on other occasions has heard him, Todd, make the same remarks to the same effect.

From the testimony of Daniel Latourette, it appears that he owned the property in question, and bought it of Philip Vanarsdalen for something like twenty-one thousand dollars. "He bought it subject to a lien of six thousand dollars, to be paid to the heirs of Joseph Vandoren upon the death of their mother, and to their said mother the interest to be paid during her life. The six thousand dollars was considered at the time of the said purchase, part of the purchase money, and deducted from it. When it was again sold afterwards by the sheriff of Somerset county, it was sold subject to the said six thousand dollars, and Philip Vanarsdalen again became the purchaser."

Arthur Schenck says, he met Todd on the road, before Mrs. Vandoren's death. "Mr. Todd then said there was six thousand dollars of the purchase money of said property, of which Peter and Vanderbilt Vandoren ought to have a share, but he thought it would cause a lawsuit." The witness also says, he was present at the sale by the executors of Studdiford. It was stated

that there was six thousand dollars to remain on the said property, and that the property was to be sold subject to said six thousand dollars."

John J. Schenck, another witness, says: "Deponent was present at the time of the sale, when Mr. Todd was the purchaser thereof, sold by the executors of Studdiford. The said property was sold subject to the six thousand dollars on mortgage." Also, "Witness recollects hearing Mr. Todd saying he wished for the privilege of paying off the six thousand dollars, as it would save him some interest. At the time of sale witness did not hear any claim made by the executors of Mr. Studdiford to the twenty-four hundred dollars."

Cornelius Peterson says, he was present at the sale of the mill property by the heirs of Joseph Vandoren, deceased. "At this sale one third of the purchase money was to be on the property during the widow's life. The interest to be paid to the widow during her life, and the principal after her death. Was present at the subsequent sale by the executors of Mr. Studdiford. Thinks it was sold at this sale at eleven thousand two or three hundred dollars. During the time that Latourette owned the property, the six thousand dollars was considered a lien upon said property."

Abraham D. Baird, another witness, relates conversations with Philip Vanarsdalen, which do not in some respects corroborate the statement made in his answer respecting the lien on the property at his first purchase thereof; and, among other things, the witness also says, "He, Vanarsdalen, said, that as he had lost so much by the property, in strict justice the money ought to belong to him, Vanarsdalen." On cross-examination on the part of the defendants, witness says, "that the six thousand dollar bond spoken of, was the incumbrance upon the property, so understood from Vanarsdalen and others, the same for which the mortgage was given, and for which he, Vanarsdalen, had paid the interest to the old lady."

It also appears from the deposition of Isaac Vanarsdalen, that in conversations with Philip Vanarsdalen, but the time when

does not appear to be stated, that the witness understood him, (Philip Vanarsdalen,) that Peter and Vanderbilt were entitled to their share of the six thousand dollars. From the testimony of John I. Gaston it appears, that the twenty-four hundred dollars for which the defendant Todd was bound, the witness was applied to by the said defendant to assist him in getting clear of. He, Todd, further said, that "he did not mean to pay it if he could avoid it."

These were complainants' witnesses. There were also two witnesses examined on the part of the defendants, principally to prove that Philip Vanarsdalen, when he purchased the mill property, was in good circumstances, and considered an industrious and thriving man; and one of them says he lost his property by the depreciation in value and by other circumstances.

From an examination of this testimony, I am satisfied, that on the sale by Jeromus and Peter Vandoren to Philip Vanarsdalen, six thousand dollars of the purchase money was understood between them to remain a lien or incumbrance on the property in question—the interest to be paid to the widow Sarah Vandoren during her life, and the principal to be paid in one month after her death, for the heirs of Joseph Vandoren. That this same lien continued while the property was owned by Daniel Latourette, and when sold by the sheriff to said Vanarsdalen. That when he assigned it as an insolvent debtor for the benefit of his creditors to Peter Studdiford, as before mentioned, it was then, and still is, charged and chargeable with this lien. The assignment, by operation of law, passes the rights of the insolvent in the same plight and condition that he possessed them: *Sugden*, 364; 1 *Vern.* 267; 2 *Mad. C.* 128; 9 *Vesey*, 100; 2 *John. Chan. R.* 443; 10 *John. R.* 540.

In the case of *Bayley* v. *Greenleaf*, 7 *Wheat.* 46, the lien for purchase money was attempted to be established against a mortgagee who had entered into engagements, and for further advances. The court would not allow the lien against creditors holding a bona fide conveyance from the vendee. In the cause in question, I consider the defendants holding under assignment

by operation of law, and differing from the case decided by the court. That such a difference exists, will appear from the words cited by the court, page 56 of the master of the rolls, (9 *Vesey*, 100,) an extract from which is as follows: "I have always understood the assignment from the commissioners, like any other assignment by operation of law, passed his rights precisely in the same plight and condition as he possessed them; even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. This shows they are not considered purchasers for a valuable consideration, in the proper sense of the words," &c.

There does not appear to have been any money or valuable consideration paid or given upon the conveyance of the said premises from Studdiford to Vanhorn, and reconveyance by him to Studdiford. In Studdiford's deed, it is expressed to be subject to all lawful incumbrances thereon after devoting the purchase money to their payment as far as the same may be sufficient. In Vanhorn's deed, he covenants as to his rights conveyed by his assignee. These are unusual words in common conveyances, and from all the facts and circumstances connected with those deeds, it appears that whatever incumbrances existed were not changed by the transfer and retransfer of the property. It appears that Peter Studdiford knew of, and recognized the debt that Philip Vanarsdalen owed for the property, by an indorsement on his bond for six thousand dollars, on the twenty-fifth of April, eighteen hundred and twenty-two, when John Frelinghuysen, one of the agents of the Rev. Peter Studdiford, who was assignee of Philip Vanarsdalen, paid four hundred and twenty dollars interest on that bond, which was received and a receipt signed for the same by Sarah Vandoren.

And to all this is to be added the acts, proceedings and accounts of the executors of Peter Studdiford, before mentioned, whereby the payment of this lien or incumbrance of twenty-four hundred dollars is provided for, and the purchaser is bound to pay it as the court directs. On the hearing of this cause there

was exhibited, without objection, a mortgage given on this property in eighteen hundred and twenty, by Philip Vanarsdalen to Peter Studdiford, to secure the payment of five thousand dollars, with interest, according to the condition of his bond therein mentioned, which mortgage was cancelled in eighteen hundred and thirty-four, and which is marked by me, Exhibit P. V. A. No. 1, on the part of the defendants. If this evidence is intended to prove a debt due to Peter Studdiford, it is not so set up or insisted on in the answer of his executor, nor is the bond referred to in that mortgage, nor the accounts of Peter Studdiford as assignee of Philip Vanarsdalen, in evidence in this cause. The mortgage thus standing alone, is not sufficient evidence of any demand on that property. If any thing was due on that mortgage to Peter Studdiford, whether it was taken with or without notice of the lien claimed by the complainants, are facts not in issue; and whether said mortgage was not entitled to priority over said lien, is a question not raised, and upon which no opinion is intended to be given. From the time of the purchase of Philip Vanarsdalen, as before mentioned, no one alleges that he has been defrauded by the lien in question, or proves that the complainants have received this twenty-four hundred dollars; nor is there any one who claims that sum that proves himself a bona fide purchaser, paying his purchase money, without notice; for without having paid his money, he is not entitled to the protection of such a purchaser: *Jewett* v. *Palmer*, 7 *John. Chan. R.* 65.

The result of the consideration which I have given to this case, is: That the complainants ought not to have brought separate suits, as was insisted on by the defendants, but very properly joined in the suit when they filed their bill; and that the present complainants are entitled to the twenty-four hundred dollars in question. With respect to the interest on that sum, which Todd objects to paying pending this controversy, there is no allegation in the answer of the said James W. Todd, that he has ready the amount of principal and interest, nor any offer to pay the same into court when directed; but says, the complainants

and Studdiford's executor demand the twenty-four hundred dollars, so that this defendant cannot act safely in the premises but by the order and under the direction of this honorable court. There is no allegation that the money has been unemployed, or that he has sustained any loss thereby, but desires to act under the direction of the court. If he wished to have the same benefit as a complainant in a bill of interpleader, he ought at least to have conformed to the offers in such a bill. But as the said James W. Todd did not, by his answer on file, attempt to get clear of the payment of the said twenty-four hundred dollars, and may have the money ready and unemployed by reason of this controversy, interest must be allowed and computed as is herein after directed.

I do, therefore, advise your excellency to dismiss the complainants' bill as against the New-Brunswick Fire Insurance Company, without prejudice to any party; and to vacate and set aside the decree pro confesso against the defendants who have answered; and to declare and decree, that the complainants are entitled to the said twenty-four hundred dollars, with interest at six per cent. for the delay of payment, from the tenth day of December, eighteen hundred and thirty-four, being one month after the death of the said widow of the said Joseph Vandoren, until the date of the said master's report; and that the same constitute an equitable mortgage, lien and incumbrance on the property in question, sold by the executors of the Rev. Peter Studdiford, and now owned by the defendant James W. Todd, and that the said premises are chargeable therewith, and charged accordingly with the same; that it be referred to one of the masters of this court to take an account of what is due to the said complainants, for the said principal and interest as aforesaid, and fix a day for the payment thereof. But if the said James W. Todd shall pay the said twenty-four hundred dollars into this court, which he has liberty to do, and produce a certificate thereof to the said master before he finishes his report, the said master shall then compute interest from the tenth day of December, last aforesaid, to the time of such payment into court, and may then inquire how long that

money has been in the hands of the said James W. Todd, unemployed, since the said tenth day of December, eighteen hundred and thirty-four, and ascertain the loss of interest, if any, occasioned thereby; which loss of interest is to be deducted from the amount of interest computed as aforesaid; and such interest, or the balance thereof, if any, must likewise be paid into court without delay. That the said master make his report with all convenient speed, and that all further equity and directions, and the question of costs, be reserved until the coming in of the said master's report, for the further order and decree of this court.

ELIAS VANARSDALE, Master in Chancery.

Decree accordingly.

JOSEPH BASSETT and others v. ISAAC JOHNSON and WILLIAM JOHNSON.

* The practice of sending ordinary matters to a jury for their decision, ought to be discouraged. But in important cases, where the evidence is so contradictory as to raise serious doubts on the mind of the court as to matters of fact, it is proper to direct an issue, or order a suit at law.

Issue awarded, with special directions touching the conduct of the trial; and leave given for a special jury.

THIS cause came originally before the court upon motion for an injunction, upon bill filed and affidavits taken by both parties, when the injunction was allowed. It was afterwards heard upon motion to dissolve the injunction after answer on the part of the defendants, which motion was denied.† The evidence having been taken, the cause came on for final hearing at January term, A. D. eighteen hundred and thirty-six, upon the pleadings and proofs.

* Accord. *Trenton Banking Company* v. *Woodruff*, 1 *Green's Chan. R.* 117; *Garwood* v. *Admr's of Eldridge*, *Ibid*, 290.

† See ante, page 374, reported in the name of *Sinnickson* v. *Johnson*.

[Bassett et al. v. Johnson.]

McCulloch and *Williamson*, for complainants.

Jeffers, for defendants.

THE CHANCELLOR. The bill was filed in this case in July last, for an injunction to restrain the defendants from further building and completing a dam, then in progress, in Salem creek. The injunction was sought on the ground that valuable meadows and property of the complainants were seriously affected by the obstruction which had been placed in the stream, and that, if the defendants were permitted to continue and complete it, the meadows would be irreparably injured. After a full hearing of the parties on the application, affidavits having been taken on both sides, an injunction was ordered. The court was satisfied that serious injury had been suffered by the complainants, and the weight of evidence went to show that if the dam was completed and made tight, the injury would be increased and become irreparable. It was strongly insisted at the time by the defendants, that the flow of water upon the meadows was occasioned by unusually heavy rains, which fell on the twelfth and fifteenth of July, and not by the obstruction in the creek; and that the completion of the dam would not seriously injure the meadows. Hence the court, in delivering the opinion, took occasion to state, that if it should turn out, as the defendants supposed and believed, that the injurious overflow was occasioned, not by the dam, but by the rains which had lately inundated that part of the country, and was therefore accidental and temporary; or if the defendants could, at some future time, make it appear that the completion and filling in of their dam would not raise the water so as permanently and seriously to affect the property of the complainants, the injunction might be dissolved, and the complainants turned over to their legal remedies.

The defendants having filed an answer to the bill, moved to dissolve the injunction on the answer. This was refused by the court, for reasons heretofore given, and the cause was brought on for final hearing in January.

It was supposed that the question involved in the issue could not be of difficult solution; that whether the meadows had been seriously affected by the overflow, was a plain matter of observation, about which there could not be much contrariety of opinion; that whether the injury was continuous, the result of some abiding cause, or temporary, occasioned by heavy rains, could be readily ascertained without any dispute; and that the question whether the completion of the dam would or would not increase the water above, would be readily answered to the satisfaction of all.

In this the court has been disappointed. Upon each point there is great diversity of sentiment. Upwards of sixty witnesses have been examined, some of them at great length, and an immense volume of testimony has been taken, some of which, however, has but a remote bearing upon the issues.

The cause was elaborately and ably argued, and I have endeavored to give to it a careful examination. And,

Upon the *first* point, to wit, whether the meadows of the complainants had been seriously affected by the overflow, I think the evidence proves that they were injuriously affected during the last season, or a part of it, by water standing upon them. That matter was proved before the injunction was allowed, in August, and the weight of the evidence now before the court confirms it. It is fully shown that they were considerably inundated, and for a longer period of time than usual, and at a season of the year when the effect must necessarily have been injurious. It will be unnecessary to dwell on this part of the case, as it is not important.

Upon the *second* point, whether the injury sustained was continuous, the result of some abiding cause, or temporary, occasioned by unusually heavy rains and back-water, there is great difference of opinion. And this I take to be the great question in the cause. These meadows, before the dam or stopping, were liable to be overflowed occasionally from rains and freshets, but the water soon ran off, and the injury, if any, was temporary. These overflows would vary according to the quantity of rain or

water coming from above. In great rains and floods, such as those which occurred in July last, the meadows would be subject to their influence for a longer period of time than was usual. If the injury has resulted from this cause, and this alone, then the erection of the dam has not been prejudicial. On the other hand, if the dam or stopping has so operated upon the water of the creek above, as to prevent the waters on the meadows running off as they otherwise would have done, and thereby the meadows have been injured, and continue to sustain injury; and if the injury is of a serious character, permanently impairing the value of the meadows, the dam must be considered as a nuisance and the complaint of the plaintiffs just.

Respectable men differ widely on the subject. Some insist, and with a knowledge derived from personal observation too, that the meadows were no more wet than in former years, except just at the period of the heavy rains, and that those rains passed off without material damage; and some think they were drier;—while others most positively affirm that the meadows were seriously injured, not owing to heavy rains and back-water, but to the height of water in the creek; that the dam prevented the tide above from falling to its ordinary level by one and a half or two feet, and some say two and a half feet, in consequence of which the waters could not be drained off the meadows; that the sluices could not play, the water even at low tide being higher in the creek than in the ditches, and of course there was no vent; and that the waters continue to injure the meadows, though not so much now, since the dam has settled.

I have sought with great solicitude to reconcile the testimony, but without success. The fact that the tide, since the erection of the dam, does not rise so high nor fall so low as before, is most clearly established. It admits of no dispute. The plain inference from this fact would seem to be, that the meadows cannot be so well drained as before. It is proved that they are low and flat. They can be drained only by sluices leading the water from them into the creek. If when the creek fell to its ordinary level at low water, they were not more than sufficiently drained, how can it

be that when the tide does not fall to that level by the space of two feet, they can be cleared of water as well as before? And yet respectable witnesses testify that the meadows are as dry as heretofore, and that the stopping has had no effect upon them. I am unable to account for this. It is said, to be sure, that since the dam the tide does not rise so high as formerly; but I do not perceive how that helps the case. The ordinary tides are kept out by the embankments; and whether they rise higher or lower is of no consequence, unless they overflow the banks. The water vented by the sluices is not ordinarily the tide water, and it cannot be vented unless the tide falls low enough to admit a free passage through the sluices.

My own inference would be, that these meadows, being low, must sustain permanent injury in consequence of the tide not falling as low as formerly; and with this inference the complainants' witnesses accord. But they are met by positive testimony on the other side, affirming that no such result has taken place, and that the meadows have been, taking the season through, as dry as formerly. And I feel embarrassed in forming a judgment that is to decide the rights of these parties to a very large amount. I am relieved to know that there is a mode in which the facts can be ascertained, and the conscience of the court informed. It is a fact the decision of which, under all the circumstances of the case, is peculiarly proper for the decision of a jury. I am opposed to the practice of sending ordinary matters to a jury for their decision, and think it should be discouraged; but in important cases, where the evidence of respectable witnesses, with the same means of information, is contradictory, so as to raise serious doubts on the mind of the court, it is proper to direct an issue, or order a suit at law. In this case I think an issue would best answer the purposes of justice. It would be more expeditious, and more under the control of the court; and if the facts be once ascertained, whether the erection be or be not a nuisance, there will be little difficulty in settling the case.

I shall, therefore, direct an issue to be made up in the usual way, to try the fact, whether the erection of the dam by the de-

fendants has seriously and permanently affected the meadows of the complainants lying above it; and that the issue be carried down for trial at the next Salem circuit, in June. Either party may notice the cause for trial, and the defendants in the issue may carry down the record by proviso, so that the trial may be had at the ensuing circuit. A special jury will be ordered by this court, on the application of either party, subject to the preference given to the plaintiff by the rules of the supreme court.

Where witnesses are dead, or cannot be procured, their examinations may be read; and no new witnesses shall be produced without giving fifteen days notice of the intention to produce them, with the name, addition and place of abode of such witnesses.

Order accordingly.

CORNELIUS W. VANWINKLE v. EDWARD CURTIS and others.

The rule that in injunction bills the particular title and interest of the complainant must be set forth, is more especially applicable to cases of waste.

But in cases of trespass and nuisance, the title and estate of the complainant are set out with sufficient certainty in a bill for an injunction, if the complainant alleges himself to be the owner of the premises in fee simple by purchase, and to be in possession.

A greater degree of precision in cases of trespass or nuisance is not required, especially where it is not alleged in the bill that the defendants make any pretence of right in themselves.

In cases of trespass or nuisance, an injunction will not be granted, unless the injury about to be committed is of a serious, permanent and irreparable character, such as cannot well be compensated in damages, and which therefore requires the extraordinary power of chancery to prevent its commission.

Where it appears that the stream, a part of which is sought to be diverted, runs through a corner of the complainant's farm, a quarter of a mile from his dwelling; that it runs through low, swampy, marshy ground, and is not nor has ever been applied to any practical use, equity will not interfere by injunction to prevent the diversion.

BILL for injunction, to restrain the defendants from partially diverting a stream of water, which flowed through the com-

plaintiff's land. On filing the bill an injunction issued, as prayed for. The defendants having answered, moved to dissolve the injunction. The cause was heard upon the motion to dissolve, on bill and answer. The grounds of the application are fully stated in the opinion of the court.

E. Vanarsdale, for the defendants, in support of the motion.

T. Frelinghuysen, contra.

THE CHANCELLOR. The bill was for an injunction to restrain the defendants from diverting a water course. It charges, that the complainant is owner of a farm in the county of Essex, in fee simple, of about seventy acres, and that a stream of water, known by the name of the Third river, has run from time immemorial through the said farm, until it enters the pond of the defendants' paper-mill. That the defendants own a paper-mill, mill-dam and pond immediately below the farm, which have existed there for forty years, and during all that time have been supplied with water from said stream as it now runs, and has immemorially run through said farm. That the stream greatly fertilizes the fields of complainant, serves to water his cattle, and has a head and fall on his land which makes it of still greater value as a mill seat and privilege, which may be disposed of or used to profit and advantage. That the defendants are about diverting the stream from its natural channel above the farm of the complainant, so as to bring it into their dam on the south-western side of their pond, instead of where it now enters; and that, having offered an inadequate compensation for the privilege, which was refused, they are about doing it without leave of the complainant. The bill then charges that the stream is of great value to the complainant, and that he apprehends and believes that if the canal is suffered to be dug and completed, it will not only destroy the value of the stream, as a mill privilege, on said farm, but in dry times will cut off the complainant from the usual supply of water for his cattle and the ordinary purposes of

husbandry. That unless restrained, they will soon finish their canal, and leave the complainant to uncertain litigation and suits for damages, for the injury done.

The answer admits that the complainant is the owner of the farm mentioned in his bill, and has owned it about three years, having paid or agreed to pay for it twenty-two hundred dollars. It admits further, that the stream runs and always has run through one corner of the farm, leaving a strip of land containing less than one acre and a half on the southerly side of the stream, which does not otherwise run through the farm. That the said land is not worth more than thirty dollars per acre, is wet and swampy, producing coarse bog grass, bushes and briers, and principally, if not only, used in the spring season for early pasture for cattle. It admits that the stream has always run where it now does, but denies that it fertilizes the fields of the complainant, or is used by him for watering his cattle, or has a head and fall on the said farm for a mill seat and privilege to be used and disposed of for that purpose; except that the said complainant has about eighteen inches, and not exceeding two feet fall on said stream, which has never been used, and probably never will be used to the end of time as a mill seat, or for any such purpose. The answer then alleges that the lands of complainant lying along said stream, are used for pasture, and not cultivated, and on the northerly side thereof are low, miry, swampy meadows, part bearing cranberries, with many springs on the side of the said stream; that the stream is nearly a quarter of a mile from the complainant's house, and is not used by him for watering his cattle, but that he uses a large spring near his house for that purpose, which affords an ample supply at all seasons for his own cattle and those of his neighbors. That the defendants are anxious to increase their water-power by bringing a part only of said stream, by means of a canal, to their mill. That they do not intend, nor will they ever, unless by consent, take all the water of said stream, but leave a large part to follow the usual course into the pond. The answer then details the particulars of various attempts made to come to some agreement

about compensation, and insists that the offers of the defendants were an adequate and more than an adequate compensation for any injury the complainant might sustain by the partial diversion of the stream in the manner contemplated by the defendants. And the defendants insist, that the injury complained of is neither grievous nor irreparable; that the value or substance of the inheritance is not put in jeopardy, nor does it injure the value of the property of the complainant; and that he ought to be left to his remedy at law.

The motion now is, to dissolve the injunction which was ordered on the exhibition of the bill.

Upon the case made by the complainant in his bill, the injunction was properly awarded before answer. The injury about to be sustained was alleged to be of a permanent and serious character, and the mischief would have been accomplished but for the interference of the court. The title and estate of the complainant were set out with sufficient certainty. He alleges himself to be the owner in fee simple by purchase, and to be in possession. A greater degree of precision is not required in cases of trespass or nuisance, especially where it is not alleged in the bill that the defendants made any pretence of right in themselves. The rule that in injunction bills, the particular title and interest of the complainants must be set forth, is more especially applicable to cases of waste. The defendant then is in possession; and the party seeking to restrain him, must do it on the ground of some privity of estate. It is necessary, therefore, that the complainant should set out his right with accuracy and certainty, that the court may judge of the propriety of interference. And it is because the defendant is in possession, and claiming the right to do the acts complained of, that an injunction will not issue in cases of waste before answer, except it be absolutely necessary. But the reason of the rule does not apply to cases like the one now under consideration.

The only question of any importance to be decided is, whether the injunction shall now be dissolved upon the answer of the defendants, and the complainant be put to his legal remedy.

That the act about to be committed by the defendants, and from the commission of which they were restrained, was an unlawful act, admits of no question, from the pleadings. They can have no legal right to divert the flow of the water from its accustomed channel, and thereby deprive the complainant of any material part of it. In Massachusetts, the privilege of taking water in certain cases, upon making compensation, is given to mill owners; but it is by special statute, and is not in accordance with the principles of the common law, by which that species of property is protected in this state. If the right of ownership is violated, the law will give redress; and where the appropriation of private property, though not of any great value, has been intentional and without permission, the amount of redress should not be weighed in golden scales.

But it is not in every case of infringement of private right, that a court of equity will interfere by injunction. In a court of law the inquiry is, whether a wrong has been committed; and if it has been, reparation must be awarded. Here the inquiry is, whether the injury about to be committed is of a serious, permanent and irreparable character, such as cannot well be compensated in damages, and which therefore requires the extraordinary power of chancery to prevent its commission. It is important to preserve this distinction. The harmony and usefulness of the two courts are both promoted, and the interests of the public better served, by keeping the jurisdictions separate.

The principle on which equity interposes for the prevention of trespasses and injury of that description, where there is no privity of contract or estate, is well understood. The only difficulty is in applying it to the different cases as they arise.

In applying it to the case now under consideration, I am of opinion, upon the facts as presented by the pleadings, that the injunction should be dissolved, and the complainant be left to his legal remedy. The bill itself does not allege that the injury to be sustained will be irreparable. But it charges facts which, standing uncontradicted, are sufficient to induce a conviction that it will be serious and permanent.

The principal facts are, that the defendants, by cutting the canal and diverting the stream, will destroy a mill privilege, and in dry seasons deprive the complainant of the benefit of water for his cattle and the ordinary purposes of husbandry. These are both met by the answer. Taking that to be true, as I am bound to do on this occasion, it is evident the complainant has no mill site on his land, nor such fall of water as can be turned to any considerable advantage. And it is to be remarked, that he does not set out in his bill that he ever had any idea or design of using the water for that purpose. As to the other charge, that in dry seasons he would be deprived of the benefit of water for his cattle and the ordinary purposes of husbandry, it is denied by the answer that the stream is now used, or has ever been used, either for watering cattle or irrigating and fertilizing the land. It appears that the complainant has a much more convenient as well as a permanent resource for watering his cattle, and that the ground through which the stream runs is low, marshy and swampy ground, and not susceptible of being fertilized by irrigation. Such being the case, it is not conceived that the complainant's injury can be of that permanent and serious character as cannot be compensated in damages, and calls for the preventive power of the court.

The case of *Gardner* v. *The Village of Newburgh*, 2 *John. Chan. R.* 162, was greatly relied on by the complainant's counsel to sustain the injunction. The case is valuable in many respects. It asserts the concurrent jurisdiction of chancery over private nuisances, and proves it to be ancient and well established; and that the foundation of it rests in the necessity of a preventive remedy, where great and immediate mischief or material injury would arise to the comfort and useful enjoyment of property. This is the true doctrine of the court, and it was properly applied in that case; for it appeared by the bill, that the water about to be diverted supplied at the time a brick-yard on the plaintiff's farm, a large distillery, erected at great expense, and a churning-mill, and afforded water for a mill seat, where he was about to erect a mill for grinding plaister of paris. The bill was

sworn to and corroborated by sundry affidavits, and it was shown that all the improvements would receive immediate and great injury. The injunction in that case was properly granted, and if I had similar grounds on which to proceed, I would willingly follow the example. But when it is made to appear that the stream, a part of which is sought to be diverted, runs through a corner of the complainant's farm, a quarter of a mile from his dwelling; that it runs through low, marshy, swampy ground, and is not nor has ever been applied to any practical use, there is no such great, immediate or permanent injury as will authorize the continuance of the injunction.

In the case of *Quackenbush* v. *Van Riper*,* which was on an injunction to restrain a private nuisance, the court acted upon the same principle now recognized, and refused to interfere, because it appeared that the injury was neither serious nor immediate. In granting the application now made, I follow that decision, believing it to be founded on safe authority. If that is to be departed from, I know not where the power of this court is to end. It would lead to an interference in all cases where the least invasion of private property is about to occur. "It would have to adopt the principle, that an injunction will issue for the prevention of every trespass or infringement of right, where a suit at law might be brought." Such is not its province, and should not be its practice.

Injunction dissolved.

* Ante, page 350.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

JULY TERM, 1836.

JEPTHA WOODEN v. ZIBA WOODEN and others.

Equity will not, in the absence of special circumstances, interfere by injun
tion to protect a legal right, which may be tried at law.

Where the answer denies all the equity of the bill, the injunction to stay p
ceedings at law will be dissolved of course.

MOTION to dissolve an injunction to restrain proceedings
law. The chancellor having been of counsel with one of t
parties, the cause was heard at his request before Elias Vana
dale, esquire, one of the masters of the court. The cause w
submitted without argument.

I. H. Williamson, of counsel for defendants.

W. Halsted, of counsel for complainant.

THE MASTER. The bill was filed on the sixth of Ap
eighteen hundred and thirty-five; and, among other things, s
forth, that Ezra Wooden died on the twenty-fifth of Septemb
eighteen hundred and thirty-two, possessed of a considerable r

and personal estate; leaving eight children, among whom arose a controversy as to the distribution of his estate. That Ziba, Nathan and Peter Wooden, sons of the said deceased, insisted that the said Ezra Wooden had made a will, devising all his property, and the other children insisting that there was no will. That the complainant, being of opinion that there was no legal will, on the nineteenth of November, eighteen hundred and thirty-two, agreed with the defendants, with a view of compromising all differences of opinion in relation thereto, in manner following, viz.:—"Articles of agreement, made this nineteenth day of November, between Peter, Ziba and Nathan Wooden, of the township of Warren, county of Somerset, and state of New-Jersey, of the first part, and Jeptha Wooden, of the same place, witnesseth; that the said party of the first part, do upon certain conditions, agree to let the said Jeptha Wooden have the west rooms, together with five acres of land on the west end of the house, being a part of the homestead farm of Ezra Wooden, deceased, if provided the will of the said deceased shall be established, otherwise this writing to be void; and the said Jeptha doth hereby acknowledge himself fully contented and satisfied with said will in question. Witness our hands and seals, this nineteenth day of November, eighteen hundred and thirty-two." That in part performance, the defendants put the complainant in possession of the two west rooms of the house in the said agreement mentioned, on or about the first of April, eighteen hundred and thirty-three, and he has continued in possession under said agreement ever since, and still continues in possession thereof. The bill then further states, that on the day following the date of the above agreement, another agreement was made, which is set forth, whereby the complainant and several children of the deceased therein named, were to release to the defendants the homestead farm; and the defendants were to release to the complainant and other children named, several lots also mentioned, with various provisions not deemed necessary now to be noticed. That in pursuance of the said last mentioned agreement, the defendants and their wives executed certain releases,

in the bill mentioned, and the complainant and his wife and other persons in the said bill named, also executed a release to persons therein mentioned. That a deed of release for said homestead farm was made out from the complainant and others to the defendants, on the tenth of December, eighteen hundred and thirty-two, and was executed and acknowledged by the complainant and his wife, and the other parties thereto, except the acknowledgment of Elizabeth Freeman is disputed, and except also that Robert Morris and Sarah his wife refused to execute the same—the said Sarah Morris and Elizabeth Freeman being two of the daughters of the said Ezra Wooden, deceased.

The bill also sets forth a suit in this court by the defendants to carry the last mentioned agreement into effect, and the proceedings thereon; and that after the first mentioned agreement, about the first day of December following, the defendants agreed to pay the complainant three hundred dollars, by certain promissory notes, in lieu of the five acres therein mentioned, and since then Ziba, one of the defendants, has had possession thereof. That on the first of January, eighteen hundred and thirty-five, Ziba Wooden, one of the defendants, served a notice on the complainant to remove out of the said two rooms on the first of April following; and upon inquiry what was meant by serving said notice, the said Ziba replied, because the complainant's wife quarrelled with the wife of another person occupying the middle part of said house, and threatened to turn the complainant out of the said two rooms, and in pursuance of such intention commenced an action of unlawful detainer before one of the justices of the peace of the county of Somerset, and sets forth the proceedings before said justice. That the said two rooms are part of the house which belonged to the complainant's father, and that he does not unlawfully detain the same; and insists, that if the pretended will of the deceased is established, he is entitled to hold the said two west rooms; and if not established, then he is entitled, as one of the children and heirs of the deceased, to an equal part of his real estate, and to the possession of the said rooms and real estate as tenant in common. That the complainant

never entered into a lease to the said Ziba Wooden for the said two rooms, or acknowledged him as his landlord, but entered in pursuance of said article above recited. The bill also sets forth certain pretences, which are alleged to be untrue; and prays a specific performance of the agreement of the defendants, entered into with the complainant on the nineteenth of November, eighteen hundred and thirty-two, or that they may pay the three hundred dollars in lieu of the five acres of land in the said agreement mentioned, the complainant being willing to perform his part of said agreement; or that the second article of agreement, bearing date the twentieth of November, eighteen hundred and thirty-two, and the deed of release referred to, executed by the complainant and others in pursuance of said article, be declared null and void, and the defendants restrained from prosecuting the said unlawful detainer, and for further relief.

The bill was sworn to by the complainant on the sixth of April, eighteen hundred and thirty-five, and on the same day an order was made by Samuel L. Southard, esquire, one of the masters of this court, designated for the purpose, that an injunction issue agreeable to the prayer of said bill, which was issued accordingly and served.

On the fifth of October, eighteen hundred and thirty-five, the defendants filed their answer, and gave notice of the application to dissolve the injunction in January term following. So much of the defendants' answer will be taken notice of hereafter as may be applicable to the motion under consideration.

If the complainant's right to the injunction was insisted on upon the ground that there was no will left by his father, and that he is one of the heirs at law of Ezra Wooden, deceased; the answer of the defendants sets forth a will sufficient to pass real estate, whereby, among other things, the said deceased devised the said dwelling-house and part of the homestead to the defendant, Ziba Wooden; and further says, that the said will is not yet established. But in case there was no will, and he was an heir at law and tenant in common, injunctions are not frequent, and only granted on special circumstances: *Eden on Inj.* 171.

And I do not perceive in the bill any equitable circumstance set forth why this court should interfere to protect the complainant's right as heir, which is a legal right and may be properly tried at law. If the allegation that the complainant has a good legal title to the premises in controversy, was sufficient to obtain an injunction, it would seem to follow as a necessary consequence that every defendant whose title was attacked at law, and would make the suggestion of having a good title, might draw the controversy in question in this court. Such a practice would justly be complained of by the courts of law, as depriving them of the exercise of their rightful jurisdiction.

It is very clear that the second agreement set forth in the bill can give the complainant no right to his injunction, as by that agreement the complainant and others are to release to the defendants the homestead, which includes the two west rooms in controversy. The only foundation that is perceived upon which this injunction was granted by the master, is not the first agreement alone—for that has nothing positive respecting the possession of the said two west rooms, but is a conditional agreement, to take effect if the will of the deceased is established, otherwise to be void; and there is no averment that the said will is established. But the complainant states in his bill, that in part performance of that agreement, the defendants put the complainant in possession of the said two west rooms, on or about the first of April, eighteen hundred and thirty-three, and that he has continued in possession under said agreement ever since. And the complainant further states, that he never entered into a lease to the said Ziba Wooden for the said two rooms, or acknowledged him as his landlord, but entered in pursuance of the said article above recited.

Upon examining the answer of these defendants respecting these allegations, among other things they say, "And these defendants expressly deny that in pursuance of said agreement, and in part performance thereof, these defendants put the complainant in possession of the two west rooms of the house in the said agreement mentioned, on or about the first day of April,

eighteen hundred and thirty-three, or at any other time; but they say that the said complainant entered into the possession of the said rooms as a tenant to this defendant, Ziba Wooden, and was to pay rent therefor as a tenant, as herein after more particularly mentioned. And these defendants deny that the complainant went into possession under the said agreement." In another part of said answer it is set forth as follows: "And these defendants further answering in manner aforesaid, say, that after the said first agreement between these defendants and the complainant was abandoned and put an end to, and after the said agreement of compromise before mentioned, the said complainant agreed with this defendant, Ziba Wooden, to rent of him for a year the said two west rooms, and to pay him as the rent therefor the sum of fifteen dollars, and that the complainant went into possession of the said rooms under that agreement as the tenant of this defendant, Ziba Wooden, at the said rent of fifteen dollars, and has continued in possession and occupation of the said premises as his tenant, and under an agreement and promise to pay him rent therefor." And the said answer in another part thereof is as follows: "And they further deny that the complainant ever entered into the possession of the said rooms under any article of agreement entered into between them and the said complainant."

Where the answer denies all the equity of the bill, the injunction to stay proceedings at law will be dissolved of course: 1 *John. Chan. R.* 211; 2 *Ibid*, 202; 4 *Ibid*, 26.

Considering the answer above set forth as a denial of the allegations upon which the injunction was granted, and a sufficient denial of the complainant's equity to have the injunction dissolved, I do respectfully advise your excellency to grant an order dissolving the said injunction, reserving the question of costs to the hearing of the cause.

Order accordingly.

HENRY ALLEN v. DAVID TAYLOR and others.

A mortgagee having, before the mortgage debt became due, filed a bill to restrain the commission of waste upon the mortgaged premises, may, after the mortgage money becomes due, file a supplemental bill, setting out by way of supplement that the money has become due, and praying additional relief, viz. that the equity of redemption may be foreclosed and the mortgaged premises sold.

A strictly supplemental bill is always founded on facts that have occurred since the filing of the original bill. These may be necessary, either to aid the complainant in obtaining the relief sought, or in obtaining new or additional relief.

A supplemental bill should be used in preference to an original bill, whenever it can equally subserve the purposes of justice.

Where the new matter charged in a supplemental bill does not affect the rights or interests of a mere formal party to the original bill, it is not necessary to make him a party to the supplemental bill.

It is irregular to file a supplemental bill without leave for that purpose first obtained of the court.

But where no objection has been taken to the regularity of the proceedings on this ground, it will be considered as waived by a voluntary appearance and demurrer by the defendants.

Eakin, for defendants, in support of the demurrer.

Jeffers, for complainant, contra.

THE CHANCELLOR. Some time since, the complainant filed a simple injunction bill to prevent the further commission of waste on mortgaged premises. The defendants answered the bill, and upon the coming in of the answer the injunction was ordered to be dissolved. The order was not signed, nor was any application made to dismiss the bill. The mortgage money having become due, the complainant, in October, eighteen hundred and thirty-five, filed a supplemental bill, setting out that fact, and praying a decree for a foreclosure and sale of the mortgaged premises. To this bill there is a demurrer.

In my opinion this demurrer is not well taken. The com-

plainant is regularly in court by the original bill, which is filed on the same mortgage. That bill sets out the making and executing of the mortgage, the amount for which it was given, and when due and payable, and shows that the mortgage money was not then due. It charges the commission of waste, and prays an injunction. The injunction was granted. The defendants answered the bill, denying the waste, but admitting the mortgage as charged. On the coming in of the answer the injunction was ordered to be dissolved. The complainant filed a replication in season, and put the cause at issue. At this time, the mortgage money having become due, the complainant filed a supplemental bill; setting out by way of supplement, the fact that the money had become due, and praying additional relief, viz. that the equity of redemption should be foreclosed, and the mortgaged premises sold.

I think this may be done, consistently with the principles and practice applicable to bills of this character. A strictly supplemental bill is always founded on facts that have occurred since the filing of the bill. These may be necessary to aid the complainant in obtaining the relief sought, or in obtaining new or additional relief. Here the party seeks additional relief, and if all the parties are already in court, upon the same subject matter, I see no propriety in turning them round for the purpose of bringing a second suit. It is laid down as a rule in *Candler* v. *Petit et al.*, 1 *Paige*, 169, that if the complainant's original bill is sufficient to entitle him to one kind of relief, and facts subsequently occur which entitle him to other or more extensive relief, he may have such relief by setting out the new matter in the form of a supplemental bill.

It may be that this principle is stated too broadly, but I think it may properly be applied to this case. It is said in *Eager* v. *Price et al.*, 2 *Paige*, 333, that the court will not permit a party to file two original bills, and carry on two suits at the same time against the defendant to satisfy the same debt. The expense of an original bill is much greater than of a supplemental bill, and the latter should be used whenever it can equal-

ly subserve the purposes of justice. In this case the party seeks two kinds of relief. They are different in character, but both grow out of the same instrument, the mortgage, and spring from the relation of mortgagor and mortgagee. They might have been asked for in one bill, if sufficient facts had existed at the filing of the original bill to warrant it; but that not being the case, it was necessary for the complainant to ask such relief as his case would warrant. Subsequent events have entitled him to more extensive and effectual aid, and I see nothing to prevent his obtaining it in the usual way by bill of supplement.

The new matters charged not affecting the rights or interests of Dobson, who is a mere formal party to the original bill, it was not necessary to make him a party to the supplemental bill.

While on this subject, I would remark, that this bill appears to have been filed without leave first obtained of the court. This is irregular. An application for leave should always be made. No notice is necessary, unless the court, in a case of doubt, shall direct it to be given. No objection having been taken to the regularity of the proceedings on this ground, it will be considered as waived by the voluntary appearance of the defendants, and the demurrer.

Let the demurrer be overruled.

The Mechanics' Bank of the City and County of Philadelphia v. The President and Directors of the Bank of New-Brunswick.

By the English practice, exceptions to the accounts of a receiver as stated by a master, should be taken before the master, while the account is in his possession, and before he makes his report.

This practice has been generally acted on in this state; it is beneficial, and might safely be pursued in all ordinary cases. But there has been no actual recognition of the rule, except in cases where a draft of the account was served, and the party omitted to make any exceptions or suggest any alterations to the master.

[Mechanics' Bank of Philadelphia v. Bank of New-Brunswick.]

In a proceeding under a new statute, a party who is honestly seeking his rights should not be cut off by a mere technical rule.

In a proceeding under the act to prevent frauds by incorporated companies, the complainants and all the applying creditors constitute one party. The receivers are their common agents, and the solicitor on record of the complainants is their common solicitor, and regularly all orders and proceedings should be in his name.

It is irregular for any one of the creditors to appear or act by his own solicitor, without leave of the court for that purpose first obtained.

If any one of the creditors is so situated as to render it necessary that he should be represented separately before the court, application for that purpose should be made; and if substantial reasons are assigned to the satisfaction of the court, the application will be granted.

MOTION to strike exceptions from the file, and to confirm master's report, stating the account of receivers appointed under the act, entitled, "An act to prevent frauds by incorporated companies," passed the seventeenth day of February, A. D. eighteen hundred and twenty-nine.

J. S. Nevius, for complainants, in support of the motion.

Southard, contra.

THE CHANCELLOR. This is a proceeding under the statute against an insolvent bank, in which receivers were appointed to collect the assets of the institution, adjust the claims of creditors, and make distribution of the funds. Doctor Fitch is one of the creditors of the institution. Part of his claims have been allowed by the receivers, and part have been disallowed. From this last decision of the receivers, rejecting part of his claims, he has appealed to the chancellor, and his appeal is now pending undetermined. While matters remained in this state, to wit, on the twenty-fifth of February, eighteen hundred and thirty-six, the complainants obtained an order of the court, referring it to one of the masters to take and state an account of the monies that have come to the hands of the receivers, and also of the sums paid, laid out and expended by them for and on account of costs, coun-

sel fees, charges and expenses, debts paid and offsets allowed relating to or concerning their duties and business as receivers for the creditors and stockholders of the bank. The report was filed on the fifth of April, and the usual rule of confirmation entered by the solicitor of the complainants. Before the expiration of the rule, to wit, on the twelfth of April, exceptions to the account were filed by doctor Fitch, signed by himself as one of the creditors, and by Samuel L. Southard as his solicitor; and it is now moved to strike those exceptions from the files as irregular, and to confirm the master's report.

The grounds for this motion are—

1. That the exceptions to the account should have been taken before the master, while the report was still in his possession, and before it was made.

2. That the exceptions are not filed by the solicitor of the complainant, who is the general solicitor of the creditors, and the only one known on the record.

1. As to the first. This is on the supposition that the English practice has been adopted in this court. It has been generally acted on, and the benefit of it is acknowledged. But there has been no absolute recognition of the rule in this state, except in cases where it was well ascertained that a draft of the account was served, and the party omitted to make any exceptions or suggest any alterations to the master. The intimation has several times been thrown out, that it would be proper to adopt the rule, and it has been done for the purpose of accustoming masters and solicitors to its operation. In this respect it has been serviceable, and it is believed the practice might now be safely pursued in all ordinary cases. This, however, is not a case of that kind. It is novel, and the rule should not be applied to it, if the interests of parties are to suffer or be put at hazard. Doctor Fitch claims to stand in a situation adverse to the general creditors. He has large claims pending, to which they except; and he does not consider himself as represented by the solicitor for the other creditors. He chooses to have his own solicitor, and to appear separately on the record, and before the court. Whether in this

he be right or not may be considered hereafter; but as the draft of the account was not presented to him, or to his counsel in whom he had confidence, and as he does not appear to have had an opportunity to be heard, I am unwilling in this case to say that the exceptions are too late, and thus deprive this party of all hope of being heard. This is a proceeding under a new statute, and if a party is honestly seeking his rights, he should not be cut off by a mere technical rule.

2. The other point presents a question of some difficulty in practice. I think the present proceeding is irregular. If doctor Fitch can come into court as a separate party, and place his own solicitor on the record, any other creditor may do the same, and great embarrassment must needs ensue. The suit is for the benefit of the complainants not only, but all other applying creditors. They constitute one party. The receivers are their common agents, and the solicitor on record of the complainants is their common solicitor, and regularly all orders and proceedings should be in his name. Yet there may be cases in which strong reasons may be shown in favor of indulging an individual creditor with his own solicitor on the record; so that he may not be bound by the acts or admissions of one whom he did not appoint, and who he may suppose is hostile to his interests. I do not say that this is one of those cases, and I am not willing to say, absolutely, that it is not. But I think no party should be permitted to take such course of his own mere will. If he is so situated as to render it necessary, in his estimation, to be represented separately before the court, he should make application for permission to do so, and if proper it will be granted. Substantial reasons should be assigned, to the satisfaction of the court.

In this case the exceptions are considered irregular, but the party is at liberty until, and at the next term, to apply for leave to file separate exceptions to the account, by his own solicitor.

TIMOTHY DELANY v. JOHN NOBLE, Administrator of JAMES MAHER, deceased, and JOHN DOLBY and ALICE his wife.

On a bill praying a distributive share of the estate of an intestate, the court should be satisfied not only that the complainant is entitled to a part of the property, but also to what part of it he is entitled.

The complainant must prove affirmatively that he is entitled as one of the next of kin, and negatively that there are none others who are entitled, except those whose right he admits.

To examine a witness more than once without leave, is opposed to the policy not only, but to the rules and practice of the court.

But if the opposite party do not object to evidence thus taken, it does not lie in the mouth of the party offering it to call it in question.

BILL by one of the next of kin of an intestate, against the administrator, for an account, and for a distributive share of the estate. The cause was heard upon bill, answer, replication and proofs.

W. Halsted, for complainant.

Hamilton, for defendants.

THE CHANCELLOR. James Maher, the intestate, a native of Ireland, died in this state in eighteen hundred and thirty, and administration of his estate was committed to John Noble, of the county of Hunterdon. The complainant, claiming to be one of the next of kin, seeks to recover the one half part of the personal estate. He alleges himself to be the sole surviving nephew of the decedent, and that Alice, one of the defendants, is the sole surviving niece; and the principal inquiry is, whether he has made out his claim in such way as to entitle him to a decree.

The administrator makes no personal claim to the money, but sets up in his answer that other claimants have presented themselves, against whom he seeks to be protected. In the course of this suit, Noble, the administrator, filed a bill of interpleader against the present complainant and the other claimants; but

the defendants, with the exception of James Maher and one other, having failed to put in answers, that bill was, after great delay and indulgence on the part of the court, dismissed; and the inquiry is reduced to a simple point, whether Delany has proved himself to be clearly entitled to any part of the property, and if to any, what part of it?

The testimony in this case is not quite as satisfactory as I could have wished, in order to found a decree that may not only be a shield to the administrator and effectually protect him from other claimants, but be just to the next of kin. There should be no reasonable doubt as to the right of the complainant, before the money is ordered to be paid over; for a mistake once made can never be rectified.

I think it sufficiently established, that Timothy Delany, the complainant, is one of the next of kin of the intestate. Three several witnesses prove the fact that Maher in his life time acknowledged Delany as his nephew. Charles Holland, who had been acquainted with Maher from eighteen hundred and seventeen till he died, says that he, Maher, brought Delany to John M'Guigins's, and told M'Guigins that Delany was his nephew, and if he would board him, he, Maher, would pay him for it, and he did pay him accordingly. Mary Handler says, that in a conversation with Maher about his property, he said he had a sister's son, and if he had any property he would leave it to him; and some time after, he brought Delany to her house, and said that was his sister's son. He directed her to get breakfast for him, and paid for it. Elizabeth Sheridan testifies, that she knew Maher sixteen or seventeen years, and Delany about ten years. Maher often brought Delany to her house, and called him his nephew. On one occasion Delany was sick, and Maher brought him to her house that she might take care of him for a day or two, until he got well, and he, Maher, promised that he would pay for it.

If there had been evidence to show that these persons, Maher and Delany, were acquainted in Ireland, or that Maher acknowledged that he had known Delany there, it would have been

more satisfactory; but as these declarations were made at different times and to different persons, and as the testimony of these witnesses is not impeached, I am bound to consider, in the absence of all evidence to the contrary, that Maher was satisfied of the relationship, and that the complainant is the son of decedent's sister. There is some little hearsay evidence, which may at times weigh something in a case of pedigree, but it is of little importance. What there is, corroborates the complainant's testimony and claim.

As to Alice Dolby, who being beyond seas is made a party defendant, it appears by the testimony of M'Graugh, who married her daughter, that she is still living; and being the sister of Delany, she is also entitled.

That these two are entitled to the whole of the property, is not so well made out.

The bill charges that Timothy Delany is the son of Catharine Delany, formerly Catharine Maher, who was the sister of James Maher; and that James Maher had only one brother, viz. Lawrence Maher, who died without issue previous to the death of the said James Maher. But Edward Kenna, one of the complainant's witnesses, swears that he left Ireland about a year before his deposition was taken; he knew Catharine Delany, and she had three brothers, viz. John, William and Edward. Edward died about twenty-seven or twenty-eight years ago, and the other two died between twenty and twenty-seven years ago. Again, he says, Catharine's parents had five children, James who came to this country, John, William and Edward; they are all dead without issue, except Catharine, who left Timothy and Alice.

This is widely different from the allegations of the bill, and is a discrepancy which cannot fail to excite surprize. Timothy Delany must have been a man in years when he came to this country, and it is difficult to understand why he should know so little of his own family. They all lived at Ballynahill, in the county of Queens, or at Freshford, in the county of Kilkenny. Those two counties are inland and adjoin each other, and the two towns above mentioned are not far distant; and yet the ac-

counts given of the family by the complainant and his witness are greatly variant. The complainant alleges that he had but one maternal uncle, who was named Lawrence; whereas the witness swears he had three, and neither of them was known by that name, but all by other names. Unless this matter can be explained or rectified in some way, I do not see how the court can act with safety in distributing this money.

It may be answered, however, that whichever statement is taken, the result is the same; both show that the only next of kin surviving is the complainant and his sister. However this may be, I am not willing to rest upon a conclusion so obtained. The allegations and proof differ in what I consider an important particular, and it would be unsafe to rest upon a result drawn from such contradictory sources.

This Edward Kenna was examined twice by the complainant, and without leave. This was irregular. It is opposed to the policy not only, but to the rules and practice of the court. But as the defendants have not objected to the evidence, it does not lie in the mouth of the complainant to call it in question. A comparison of his two depositions shows that little reliance is to be placed upon either. In the first one, he says he was born and brought up in Queen's county, (in and near which the family resided,) but he was acquainted with none of the Mahers there except Catharine, the mother of Delany. In the second, he says he was acquainted with Catharine, and mentions that she had three brothers, gives their names, and the times of their death. He had heard of John being married, but never heard of his having any children. He then says, I was well acquainted with the family, the principal part of them lived at Freshford, Kilkenny county; and he thinks if John had had any children, he should have known it. This testimony cannot be reconciled, and goes far to show that no dependence is to be placed on any of it, unless confirmed.

If the last deposition be excluded as irregular, there will still remain a difficulty; for the first one does not prove the charges of the bill, that James Maher had but one brother, who was named

Lawrence and is dead. It proves that the deponent knew nothing of the family, and therefore could not say how many brothers and sisters Maher had, or how many nieces and nephews there may be living to share the estate, besides the complainant and his sister.

If the testimony of this witness is excluded entirely, the same difficulty will present itself. The complainant will be driven then to rest upon the evidence of M'Graugh. He is a young man who married the grand-niece of the intestate, and who testifies nothing and knows nothing of the older branches of the family. He says in one part of his testimony, that all the family in Ireland were dead at the time he married, except Alice, his mother-in-law; but lest this might convey a more extensive meaning than he intended, he afterwards says, that by all the family, he means the uncles and aunts of his wife, except Timothy; thereby showing conclusively that he meant to say nothing concerning the brothers or sisters of James Maher. They were not uncles and aunts of his wife, but of his wife's mother.

In whatever aspect, therefore, the testimony is considered, it is plain the party is not prepared at this time to ask a specific decree at the hands of the court. These are cases in which great caution is necessary, to avoid embarrassment and mistake. The burden of proof is wholly on the complainant. He must prove affirmatively that he is of the next of kin, and negatively that there are none others who are entitled. If one claims as an only child, he must prove that he is a child, and also that there are no other children. And so, if one claim as a nephew, he must show the relationship, and also that there are none others related in an equal or higher degree, or the claim is not supported.

In this case Delany claims as one of the children of Catharine Maher, a sister of the intestate. He has made out the fact of relationship, but the intestate may have had other sisters, or may have had brothers, and if they are living they are also entitled; if dead, they may have left children who are entitled, standing *in loco parentis*. The complainant, before he can perfect his

right, must prove that there are none entitled but himself and his sister, whose right he admits.

This is not a case, however, in which the party is to be turned out of court. He is claiming nothing adverse to the defendant, who is a mere trustee, and has nothing to gain or lose by the event of the cause. All he can desire is, that the funds be properly distributed, and that he himself be protected. The complainant has made out one part of his case in such way as to induce the belief that he has some merits; and I think justice requires the cause to stand over for further proof. If the complainant shall think proper to avail himself of the privilege now granted, the testimony must be taken upon notice, as in other cases. And the defendant, also, will be at liberty to examine witnesses in resistance of the claim of the complainant, or any part of it. And this last permission is given the rather, because the testimony of the defendant was entirely excluded at the hearing, on the ground of its having been irregularly taken. The court is desirous of having before it all the facts that can be adduced on either side.

The question of commissions and counsel fees is reserved until the cause shall again be heard, as they cannot well be definitely settled until it shall be ascertained what further trouble and expense the administrator may be subjected to.

Bowdewine Decker v. Amos Caskey and others.

If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor or his representatives a good title, the mortgagee will be entitled in equity to the benefit of it.

The costs of an issue at law directed by a court of equity, do not follow the verdict as of course, but are in the discretion of the court.

A mortgagee, upon a bill for foreclosure, allowed his taxed costs of an issue at law directed by the court, to try the mortgagor's title to a part of the

mortgaged premises, although the verdict at law was adverse to the claim of the mortgagor; such costs being, in the opinion of the court, expenses properly incurred in the recovery of the mortgage money.

BILL for foreclosure and sale of mortgaged premises. Hearing upon the equity reserved, after a trial at law under the direction of the court, to determine the mortgagor's title to a part of the mortgaged premises, and a verdict adverse to such title. The chancellor having been of counsel with one of the parties, the cause was, at his request, heard before Elias Vanarsdale, esquire, one of the masters of the court, at April term, eighteen hundred and thirty-six.

I. H. Williamson, for complainant.

J. S. Green, for Amos Caskey, one of the defendants.

THE MASTER. This cause was submitted by Mr. I. H. Williamson, of counsel with the complainant, and Mr. J. S. Green, of counsel with the above named defendant, and the papers left with me since the term of April last. The bill was filed on the thirtieth of June, eighteen hundred and twenty-six, and among other things sets forth, That John Caskey, on the eighth of November, eighteen hundred and sixteen, was seized in fee of the premises in question, and executed, with his wife Mary, a conveyance for the same to his son, William Caskey, which was acknowledged in due form, but never recorded; and thereupon the said William Caskey took possession of the said premises, and afterwards, on the thirty-first of May, eighteen hundred and nineteen, the said William Caskey, with his wife Elizabeth, executed a mortgage to Joseph Chandler and David D. Chandler, on the same premises, to secure the payment of two thousand dollars, on the first of April, eighteen hundred and twenty-five, with interest, &c. according to the conditions of a bond therein referred to; which mortgage was acknowledged and recorded, and which said bond and mortgage, on the fifteenth of August,

eighteen hundred and twenty, were assigned by the said Joseph Chandler and David D. Chandler to the complainant. That since the said assignment the said William Caskey has departed this life intestate, and administration of his goods has been granted to Ellis Adams and John Post. That Ellis Caskey, Alvey Caskey and Eleanor Caskey, minors under the age of twenty-one years, have survived the said William Caskey, and are his children and heirs at law. That since the execution of the said deed by the said John Caskey and his wife, to the said William Caskey, the said John Caskey has died; and the bill sets forth the name of the widow, and the names of those who are the heirs at law of the said John Caskey, deceased, and entitled to the inheritance whereof he died seized in fee simple. That the complainant has not the said deed of John Caskey and wife, nor does he know where it is, or whether it is in existence or destroyed; and the object of the bill is to establish the said deed from John Caskey and wife, to obtain payment of the debt and interest secured by said mortgage, with costs, and for further relief.

Several answers by some of the defendants were filed, and a replication thereto, a decree pro confesso against other defendants, depositions taken and exhibits made; and the cause was brought to a hearing before the chancellor, assisted by the late chief justice Ewing, one of the masters of this court, in April term, eighteen hundred and thirty-one; and afterwards, on the fifteenth of May, eighteen hundred and thirty-two, a decree was made by the advice of the said master, among other things directing that an ejectment should be prosecuted by the complainant for nine undivided tenth parts of the said mortgaged premises. The question of costs, and further equity and directions, were reserved for the further hearing and final decree of the court. In October following, an order was obtained reviving and continuing the cause against the defendants therein named, and in April term, eighteen hundred and thirty-three, there was another decree pro confesso against other defendants. On the twenty-sixth of November following, the ejectment cause directed by the aforesaid decree

was tried before Mr. Justice Drake at the circuit court held in Sussex county, and a verdict rendered for the defendants. There is no complaint that the judge misdirected the jury, or that they found an erroneous verdict, nor any application for a new trial. It would seem to be only carrying into effect this verdict, taken in connexion with the evidence in the cause, to determine that no title passed by the supposed deed in the pleadings mentioned, from John Caskey and wife to his son William Caskey. Nine-tenths, therefore, of the premises in the mortgage, in the pleadings also mentioned, from William Caskey and wife to Joseph and David D. Chandler, and by them assigned to the complainant, are not incumbered by the complainant's said mortgage, but are free and clear from the same. As to the remaining one-tenth part of the said mortgaged premises, upon the death of the said John Caskey the said tenth descended to the said William Caskey, one of the heirs at law of the said John Caskey, deceased. And although the title descended to and vested in the said William Caskey, after the execution of the said mortgage, it is nevertheless bound and incumbered thereby.

If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor or his representatives with a good title, the mortgagee will be entitled in equity to the benefit of it: 1 *Pow. on Mort.* 190, (6th English edition); *Douglass*, 710; 1 *Salk.* 276; 4 *Peters' R.* 85.

The only case I have met with in which a different doctrine is held, is in 5 *Wendell*, 44; but no case is cited by the counsel or court in support of that decision. In *Smith* v. *Low*, 1 *Atk.* 490, it is said by the chancellor, among other things, Where a person of age makes a lease, and has nothing in the premises, but they afterwards descend to him, this lease shall enure by way of estoppel.

As to the costs of the issue, they do not follow the verdict as of course, but are in the discretion of the court: 1 *Grant's Prac.* 226. The issue in this case being directed by the court for its satisfaction, and there appearing to have been a deed made and

acknowledged by John Caskey and wife, which was destroyed; I am of opinion that the defendants are not entitled to costs of the issue or of this suit. I am also of opinion, that the complainant is entitled to recover out of the said one-tenth part of the said mortgaged premises, his taxed costs of the said issue, being expenses properly incurred in the recovery of the mortgage money, together with his costs of this suit, to be taxed: *Ellison* v. *Wright*, 3 *Cond. Eng. Chan. R.* 482; 3 *Russell*, 458.

I do, therefore, respectfully advise your excellency to decree, that the plaintiff is entitled to relief and the aid of this court, to recover the debt and interest secured by his said mortgage, with his taxed costs of the said issue at law, out of the one-tenth part of the said mortgaged premises which descended to the said William Caskey, the mortgagor, upon the death of his father, John Caskey, being one of his heirs at law, together with the complainant's costs of this suit, to be taxed;—That it be referred to one of the masters of this court to take and state an account of the debt and interest secured by the complainant's said mortgage, with the amount of the taxed costs of the said issue at law;—That the said master make his report with all convenient speed; and also declare that the other nine-tenths of the said mortgaged premises are not incumbered thereby, but are free and clear of and from the said mortgage;—That the decree pro confesso against William Meeker and Sarah his wife, Samuel Caskey and Joseph Caskey; and the decree pro confesso against John Myers and Margaret his wife, Amos Caskey, Benjamin Caskey, William Caskey, Joshua Cole and Charlotte his wife, and John Caskey, be vacated and set aside as irregularly obtained: *Seaton's Decrees*, 372; 1 *C. C. R.* 426;—And that the complainant's said bill, as against the widow and children of John Caskey, the elder, deceased, who are defendants in this suit, including the children of Jane Buchanan, and also the children of John Caskey, junior, deceased, and the husbands of those that are married, defendants in this suit, do stand dismissed out of this court, without costs. Such dismission is not to extend to the administrator, the widow and her husband, and chil-

dren of William Caskey, deceased; but it is to extend to the other defendants, who are not interested in the said one-tenth of the premises in question, which are incumbered by the complainant's said mortgage. And that all further equity and directions be reserved until the coming in of the said master's report, for the further order and decree of this court.

Decree accordingly.

ROBERT A. ROBERTSON v. HEZEKIAH S. MILLER.

*A final decree will not be opened, on the application of the defendant, five and a half years after the decree was made, and four and a half years after it came to the knowledge of the defendant, upon the ground of the pecuniary inability of the defendant to make the application at an earlier day.

Applications to open decrees address themselves to the sound discretion of the court. They should be listened to, generally, with great caution, and should not be granted when the result must be injurious to the complainant.

THIS cause came on for hearing at April term, eighteen hundred and thirty-six, upon a petition on the part of the defendant to open a final decree made at July term, eighteen hundred and thirty, in favor of the complainant, upon a bill filed by him for an account and dissolution of partnership.

W. Halsted, for petitioner.

W. Pennington, contra.

THE CHANCELLOR. The complainant filed his bill in September, eighteen hundred and twenty-nine, against the defendant, for an account, and a dissolution of partnership. The pro-

* See 2 *Smith's Chan. Prac.* 25; *Millspaugh* v. *M'Bride*, 7 *Paige*, 509; *Tripp* v. *Vincent*, 8 *Paige*, 180; *Parker* v. *Grant*, 1 *John. Chan. R.* 630.

cess was returnable to October term of the same year, and was served by leaving a copy with the defendant's wife at his dwelling-house, he being absent from the state on business. At the term of April, then next, the bill was ordered to be taken pro confesso; and it was referred to a master to examine into and report the true state of the partnership accounts and transactions, and the amount due the complainant, if any thing. The master made his report, which was confirmed, and a final decree was made in July, eighteen hundred and thirty.

The defendant now applies, by petition, to have the decree opened; and to file an answer to the bill, and to have the cause re-heard on the merits. The grounds on which the application rests are these:—That in August, eighteen hundred and twenty-nine, he left this state, and went upon business to Middle Florida; and that he was detained by necessary business until August, eighteen hundred and thirty-one. In the interim, his family had removed to New-York, and he had no knowledge of the suit until he returned to New-York in August, eighteen hundred and thirty-one. He was then, by reason of misfortunes, so poor as to be unable to defray the expense of an application to have the decree opened or set aside, and was obliged to take the benefit of the insolvent laws of New-York. After this, he removed to Philadelphia, and was unfortunate there also until very recently; and would have made an earlier application to set aside the decree, but for his embarrassments and pecuniary misfortunes. The petition states that the complainant was actually indebted to the defendant, at the date of the master's report, in the sum of two thousand nine hundred and seventy-four dollars.

This is an unusual application, and of some importance in point of practice. The defendant seeks to open a final decree after a lapse of five and a half years from the time it was made, and four and a half years after the fact of the decree came to his personal knowledge, upon the ground of pecuniary inability. Applications of this character address themselves to the sound discretion of the court, arising out of the circumstances of each case as it is presented. No general rule can be found which will

apply to all. They should be listened to, generally, with great caution, and ought not to be granted where the result must be injurious to the complainant, who has conformed himself to the law of the court.

In *Wooster* v. *Woodhull*, 1 *John. Chan. R.* 539, the court was inclined to grant a similar application, upon the authority of some English cases, and was only prevented from doing it in consequence of the death of a material witness of the complainant, the want of whose testimony would have produced irretrievable injury to him. But it appears to me, on inspecting those cases, that they are not in point. In *Robson* v. *Cranwell*, *Dick.* 61; *Kemp* v. *Squier*, *Dick.* 131; 1 *Ves. sen.* 205; *Terran* v. *Waite*, *Dick.* 782, the bills were dismissed for default of appearance by the complainant; and upon his application, without unnecessary delay, were restored upon payment of the costs. In *Fry* v. *Prosser*, *Dick.* 298, the defendants made default at the hearing and suffered the decree to be made absolute, and proceedings to be had before the master. The master of the rolls ordered the cause re-heard, on payment of costs, if the decree should be varied so as to render the proceedings before the master useless. From the very brief note of this case given by the reporter, it would seem that the proceedings were not finally closed; there does not appear to have been any enrollment. *Cunningham* v. *Cunningham*, *Amb.* 89, is cited in the last mentioned case as an authority; and a reference to it will show that it has but little application to the point now under consideration. It was an application for a rehearing, two years after decree *nisi* made absolute against the defendant, and was granted by lord Hardwicke after great difficulty.

But there is a clear distinction between a decree nisi for default, according to the English practice, and a final decree after an order that the bill be taken pro confesso and reference to a master to take an account, according to our practice. The one is considered the decree of the party, the other the decree of the court: *Carew* v. *Johnson*, 2 *Sch. and Lef.* 300. Applications to open the one are treated with indulgence by the court, for ob-

vious reasons, and are generally opened on the usual terms. Attempts to set aside the other are more strictly scrutinized.

The other authority referred to by the court, in 1 *John. Rep.* (above cited,) was *Williams* v. *Thompson*, 2 *Bro. C. C.* 279; but in that case there was really no decree. The motion was made to set aside the order taking the bill pro confesso, and was made before any decree was taken. There is a great difference between opening an order to take the bill pro confesso, and opening a decree pronounced upon it subsequently: 1 *Hoff. Prac.* 551. Such decrees are placed on the same footing as other decrees regularly made, and are not disturbed except under special circumstances. In *Knight* v. *Young*, 2 *V. and B.* 184, there was an application to get rid of such a decree, and that the party should be let in to answer; and lord Eldon said, the court has never done that without a strong ground, being very tender of opening a decree of this sort, which is a mode of obtaining a judgment of the court prescribed by the legislature; not a decree nisi, such as the plaintiff, upon the defendant's default, chooses to stand by. The application was refused, though based upon an affidavit that the decree pro confesso was not the consequence of wilful default, but of imbecility of mind. And in *Herne* v. *Ogilvie*, 11 *Ves.* 77, the court, before opening an order to take the bill pro confesso, went so far as to require that the answer proposed to be filed should be exhibited, that it might be satisfied of its materiality.

The whole current of authorities goes to show, that there is a difference between decrees by default, orders that the bill be taken pro confesso, and actual decrees pro confesso. The last is considered, when compared with the others, as sacred, and to be disturbed only for weighty reasons. And even chancellor Kent, in the later opinion of *Lansing* v. *McPherson and al.*, 3 *John. Chan. R.* 424, appears to have entertained the same opinion. There the decree pro confesso was sought to be set aside six months after it was obtained, on the ground of misapprehension, and that the defendant had a good and substantial defence; and the court held that the delay had been too long,

without a very special case made; referring to the case of *Knight* v. *Young*, 2 *Ves. and B.*, above cited.

In this suit, the final decree was made in July, eighteen hundred and thirty. In August, eighteen hundred and thirty-one, the defendant was apprised of the decree. At the end of four and a half years he makes application to open it, and to be permitted to answer. The only reason assigned in the petition for this extraordinary delay, is pecuniary inability. This is a dangerous ground to stand on; and I greatly fear to make a precedent which may be followed so easily, and bring the court into great perplexity. I am not aware that it is considered in law an excuse for default in legal proceedings in any case. If a party be poor, in the legal sense of the term, the law provides for the enforcement or protection of his rights without charge; and if he will not avail himself of this privilege, he must be considered as able to take care of himself, without assistance. In the absence of authority, and against all precedent, I cannot take it upon me to disturb the decree on this ground.

In an affidavit of Miller, taken on the eighteenth of May last, which was read at the hearing without objection, the petitioner sets up another excuse. He says, that after he had removed to Philadelphia, in February, eighteen hundred and thirty-two, he called on Robertson for the purpose of procuring some settlement and adjustment of the accounts between them. Robertson said he could not settle them, because he had not the books, but he would get his books and arrange his accounts in a few weeks, and would write to him when he was ready; but he did not write, nor did he ever afterwards signify any willingness to have the accounts adjusted on fair terms.

I am not satisfied that this statement makes any thing in favor of the application. The conversation was four years before any proceedings were had in this court to open the decree. The very fact that the complainant did not write in a few weeks, as he promised, should have satisfied the defendant, that he did not mean to make the settlement according to his desire, and should have induced measures for relief. If the complainant had con-

tinued to delay him by specious and deceptive promises, a more plausible case might have been presented; but the defendant himself explicitly says, that he never afterwards signified any willingness to make a settlement. I cannot consider the petitioner entitled to relief on this ground.

There is a fact stated by Robertson, in his affidavit, which is of some importance in settling the proper course to be pursued in this case. It is, that the books from which the account is principally stated, and which were left with the master, are lost, or that they cannot now be found, and that without the books he cannot exhibit or prove his account. Some exception was taken to this affidavit, as not being sufficiently explicit. It might be more full and satisfactory. But there is no reason to believe or suspect, that it was intended to impose on the court; and taking it to be honest, it presents a serious obstacle to granting the prayer of the petitioner. For it is evident, that if the indulgence asked for is granted, it must be at the expense of the complainant. His claim must be jeoparded, and probably a great portion of it lost, and this by the negligence or wilful omission of the defendant. This would clearly be wrong; and although I regret that the party is now shut out from what he considers a just defence, I am satisfied that a regard to the uniform administration of justice, and the security of suitors in this court, requires, that the prayer of the petition should be denied.

SAMUEL RICHARDS v. JOSEPH E. WEST.

While a writ of injunction remains in force, its commands must be implicitly obeyed. The party injoined is not at liberty to speculate upon the intention, or question the authority of the court.

An injunction should always be plain and certain on the face of it, so that the party may understand it without reference to the bill filed.

If, on inspection of the bill, the injunction is found to be too broad, the de-

fendant is not to abridge it at his discretion. His remedy is to apply for such a modification of it as is suited to the case made in the bill.

RULE to show cause why an attachment should not issue, for violation of injunction.

Browning and *I. H. Williamson*, in support of the motion.

Wilson, contra.

THE CHANCELLOR. On the fifteenth of August, eighteen hundred and thirty-five, an injunction bill was filed by Richards against West, and on the same day an injunction was issued, restraining West and his confederates from cutting, felling, removing, working up, or in any way interfering with, the timber, wood or trees, standing or lying on the premises mentioned and described in the said bill, or any part thereof, and from erecting any cabins or other buildings on the said premises, until answer and further order to the contrary.

On the twenty-ninth of October, eighteen hundred and thirty-five, the complainant applied for, and on producing sufficient affidavits obtained, a rule on the defendant to show cause why an attachment should not issue against him for disobeying the injunction. Under this rule a great mass of testimony has been taken, much of which is foreign to the issue.

The service of the injunction is proved; and it is clearly shown that a large quantity of wood has been cut, some of which has been coaled, and some carted away, since the injunction was served; and the attachment must go, unless the cause shown by the defendant shall be found sufficient to justify him before the court.

The main ground of justification is, that the cutting, which was continued at two different places, was not on any part of the "West Jersey Society tract," that being the name of the tract mentioned in the complainant's bill, on which the trespass had been committed;—That within the bounds of this large tract,

there are a number of excepted and prior surveys, which are not considered as forming a part of the tract; that the cutting after the service of the injunction was on some or one of these excepted surveys, and therefore not within the command of the writ. This defence is not set up by answer, under the oath of the party, (for no answer has been filed,) but by affidavits of witnesses and by documents produced before the master.

If the places where the cutting has been continued, are within the injunction, the facts sought to be established by the defendant cannot avail him on this motion. A party is not at liberty to speculate upon the intention, or question the authority of the court. While the writ remains undissolved or not set aside, its commands must be implicitly obeyed.

The first inquiry is, whether these places are within the injunction. The writ sets forth, that a bill has been filed by the complainant against the defendant, to be relieved touching the matters therein contained; and that in the said bill it is, among other things, set forth, that the defendant had repeatedly threatened to cut and destroy the timber growing on certain premises in the bill mentioned and described, and lying in the townships of Galloway, Hamilton, Deptford and Gloucester, in the county of Gloucester, and state aforesaid, formerly called the "Great Egg Harbor tract," but now generally known by the name of the "West Jersey Society tract," or on parts of the said premises, and that he had engaged laborers for that purpose, &c. It then proceeds in these words: "We therefore, in consideration of the premises, do strictly injoin and command you and your confederates, &c. that you from henceforth absolutely desist and refrain from cutting, felling, removing, working up, or in any way interfering with, the timber, wood or trees, standing, lying or being on the said premises, or any part thereof, and from erecting any cabins or other buildings on the said premises," &c.

From the terms of the writ, it is evident the whole tract is covered by it. Its meaning is so plain, that there can be no question about it. In cases of this kind the writ should be the criterion for the party who is injoined. It embodies the order of

the court upon the complaint made, and it should always be plain and certain on the face of it, so that the party may understand it, without any reference to the bill filed. If, on inspection of the bill, the injunction is found to be too broad, the defendant is not to abridge it at his discretion. His remedy is to apply for such a modification of it as is suited to the case made in the bill, and in the mean time he must obey the command of the writ. Taking this as the principle, and I cannot doubt its correctness, the party in this case stands without excuse. The injunction covers the whole tract, without any exception, and without allusion to exceptions of any kind. Its commands have been openly and continually violated.

The defendant insists, however, that according to the bill of the complainant, it appears there are excepted surveys within the bounds of the West Jersey Society tract, that do not belong to the complainant, and are not claimed by him; that these excepted surveys are not defined, or if at all, very vaguely defined in the bill; and that the cuttings have been altogether within the bounds of the excepted surveys, or of some of them, which are more particularly described by the witnesses.

It is true that the complainant speaks of exceptions in his survey, and that he speaks of them very indefinitely; but it is equally true, that he expressly denies that the places where these cuttings were made, were within any of the exceptions. On the contrary, he alleges them to be without the bounds of the excepted surveys, and constituting no part of them; that they have been in his possession upwards of thirty years; that he has paid the taxes and enjoyed all the rights of ownership over them. This is sufficiently explicit, and there can be no doubt from the bill itself that the injunction was intended especially to protect those parts of the tract, for there the principal destruction was being committed.

Such being the facts, the defendant cannot excuse himself on this ground. He has not denied the equity of the bill. He has not seen proper to file an answer to it. When he is called on to answer for a violation of the order of the court, he attempts to

show by evidence that the bill cannot be true, or that there is so much doubt about it as to excuse his open disobedience. This, if allowed, would subvert the authority of the court. The master who awarded the injunction had full power. If the propriety of the act is called in question, it must be in a mode consistent with the practice of the court, and not in one which contemns its authority.

Let the rule be made absolute, and an attachment issue accordingly.

DAVID MERCEREAU *v.* MATTHIAS PREST, DAVID OWENS and others.

Mere inadequacy of price, in the absence of fraud and collusion, is not sufficient ground to set aside a sheriff's sale and conveyance.

BILL for relief against a sheriff's sale of real estate, as collusive. Answer by the purchaser, and the person for whose benefit the purchase is charged to have been made, denying all fraud and collusion. The cause came on for final hearing upon the pleadings and proofs, and was submitted without argument.

G. Wood, for complainant.

Nevius, for defendant.

THE CHANCELLOR. The object of this bill is to set aside a sale, and for an account, &c. It is charged, that on the twentieth of June, eighteen hundred and twenty-six, the complainant obtained a judgment against Prest for one hundred and ninety-eight dollars and forty cents. An execution issued and was levied on a horse, wagon, harness, sulky, bark, bark-mills, hides in vats, leather, household furniture, &c. In September, eighteen hundred and twenty-six, the complainant, as assignee of

Robert Montgomery, obtained a judgment against said Prest and one William Disborough, junior, for four hundred and six dollars and fifty-seven cents, on which an execution was issued, and a like levy was made. Prest took the benefit of the insolvent laws in eighteen hundred and twenty, and assigned all his property to Jacob Drake. Prior to this, viz. in eighteen hundred and nineteen, John Outcalt, D. W. Disborough and Obadiah Herbert obtained a judgment against him, upon which execution was issued, and his real and personal property was sold, by sheriff Vanarsdale. The land was sold to David Owens, for two hundred and fifty dollars, and a deed made accordingly. The complainant insists that this sale was collusive; that though the purchase was made ostensibly by Owens, yet it was for the benefit of Prest, who advanced the money; that Prest has used the property ever since he took the benefit of the act, and the assignee has colluded with him and not applied the property to the benefit of the creditors. When the sheriff levied on the personal property of Prest under the executions, Owens set up a claim for rent for one year, and the sheriff thereupon desisted from selling, though the property was worth much more than the amount of rent claimed, even if it had been a just claim, but that it was false and fraudulent. That the personal property has ever since remained in possession of Prest. It is charged that Jacob Drake, the assignee, is dead, that Nancy Drake is his heir at law, and F. S. Vanarsdale his administrator. The sheriff is also dead, and his representative is made a party. The bill prays that the defendants may account for the amount due on the complainant's judgments; that the sale to Owens may be set aside, and he be decreed to account for the rents and profits; that a receiver may be appointed to take charge of the estate assigned to Drake, and dispose of it according to the trust; and that the personal property levied on, may be applied to the satisfaction of the complainant's judgments, &c.

An answer has been filed by Prest and Owens. It admits the two judgments of the complainant, and alleges a want of consideration in both. It admits that Prest was seized of the real

estate in the bill mentioned; that he took the benefit of the insolvent act, and made an assignment to Jacob Drake. It admits the judgment of Outcalt, Disborough and Herbert, but denies that the property was struck off to Owens; says it was sold to Outcalt for two hundred and fifty dollars, at fair public sale, and the deed was made to Owens by direction of Outcalt, on his giving bond and mortgage to Thomas Letson for four hundred and sixty-one dollars, to pay a debt of Outcalt; which bond and mortgage are still outstanding, and Letson has obtained a judgment upon the bond, which is still unsatisfied, except a part of the interest which has been paid by Prest, who is tenant under Owens. It denies that the sale was collusive, or that the money was furnished by Prest, who has remained in as tenant. The answer also states, that all Prest's personal property was sold under Outcalt's execution, while Prest was in jail; the principal part of it was bought by Owens and paid for out of his own funds, and the complainant was present at the sale. Prest has been in possession of part of the personal property since, but it was loaned to Prest's wife, (who is Owens' daughter,) from motives of benevolence to her and her children. It admits the claim for rent, as stated in the bill, and alleges it to be just.

Testimony has been taken on the part of the complainant, and the cause submitted without argument.

The object of the complainant is to set aside the sale of Prest's property as made by sheriff Vanarsdale, under the execution of Outcalt, Disborough and Herbert, on the ground of fraud and collusion, and to have a distribution under the insolvent law. It appears to go on the ground that the property was purchased for two hundred and fifty dollars by Owens, when it was worth one thousand dollars, and that the money was furnished by Prest. The testimony is not very satisfactory as to the actual value of the property at the time of the sale. It has been considerably improved since the sale. A bark house and a bark-mill house have been built on it, and the shoemaker's shop repaired. Besides which, property has risen in value. One of the witnesses thinks the property is worth thirteen hundred dollars, and says Prest

offered to sell it to witness for that sum about the year eighteen hundred and twenty-seven. Jacob Van Cleef thinks one thousand dollars would be a round price for it, and does not think it would bring that at sheriff's sale. It is evident from this that the property must have been worth considerably more, even at the time of the sale, than the amount bid for it and at which it was struck off. But this will not avail the complainant. Mere inadequacy of price will not warrant the court in setting aside the sale and subsequent conveyance, unless there appears to have been some fraud or collusion between the purchaser and the sheriff or some other person: 2 *John. Chan. R.* 23; 10 *Vesey*, 292; *Bank of New-Brunswick* v. *Hasbert*, *Saxton's Rep.* 1; *Ex'r of Simmons* v. *Vandegrift*, *Saxton's Rep.* 60.

On the subject of fraud, there is no sufficient evidence to charge the defendants. It appears, as far as can be collected from a case very defectively presented on both sides, that the property was bid in by Outcalt, one of the plaintiffs in the execution by which it was sold, and not by Owens, and that Outcalt afterwards sold it to Owens at an advance. This is not an uncommon proceeding. The amount of the judgment was nearly one thousand dollars, which was more than all the property was worth at that time. The plaintiffs in execution had it under their control, and for that reason it probably brought less than it would otherwise have done. If by reason of this advantage, the plaintiffs, or one of them, was enabled to speculate on it, I do not know that he can be reached even in equity. And if he could, no more would be required than that the gain should be credited on the execution. If this were done, the execution would not yet be satisfied, and the complainant or the general creditors would derive no benefit from it.

If Outcalt purchased, and not Owens, it disposes of the charge that the money was advanced by Prest. The charge is expressly denied by Owens and Prest in their answer, and there has been no attempt to contradict the answer by proof.

The facts, that Prest resided on the property the whole time, and that he expended money on it in the erection of shops and

a barn, are sufficient to excite suspicion, standing by themselves. But the same testimony of the plaintiff which goes to prove these facts, shows also that Prest occupied the property as a tenant, at thirty dollars a year rent; and that, although the buildings he put up were his, the lots belonged to Owens, his father-in-law. This relieves the case in a degree, and places it in such a situation as to prevent the sale being set aside on the ground of fraud, without further evidence.

As to the personal property, no evidence has been adduced on either side. The bill charges that it has been suffered to remain in possession of Prest, in fraud of the rights of creditors, but makes no mention of its having been sold at the sheriff's sale. The answer admits the possession, but denies the fraud, and alleges that it was sold at the sheriff's sale and purchased in principally by Owens, with his own funds, and that it has since been left with the family for their benefit, Mrs. Prest being the daughter of Owens. This last allegation is not proved, or attempted to be proved, as it should have been; but the fraudulent possession is denied sufficiently to put the complainant on his proof, if he had any.

The case, upon the whole, is not free from doubt; but I do not find enough in it to authorize me to give the complainant the relief he asks, and shall therefore order the bill to be dismissed, with costs.

Decree accordingly.

WILLIAM EDGAR v. SAMUEL CLEVENGER and others.

It is not the practice to reiterate substantively in a supplemental bill, all the charges of the original bill, but to set them out by way of reference, and charge the new and additional facts by way of supplement.

E. Wood, for defendants, in support of demurrer.

F. B. Chetwood, for complainant, contra.

THE CHANCELLOR. When this cause was before the court a short time ago,* after a decree pro confesso, and depositions and proofs taken, the bill was declared to be insufficient to entitle the complainant to the particular relief prayed for; and permission was given him to file a supplemental bill, if he should think proper so to do, for the purpose of charging certain facts which had occurred since the commencement of the suit. Such bill has been filed; and now the defendants, who have appeared in the original suit, come in and demur to the supplemental bill, and assign special grounds of demurrer, to wit: that the complainant does not, in his said last mentioned bill, charge the fact of a fraudulent confession of the judgment by Clevenger to Wilkinson, (which judgment is sought to be set aside,) otherwise than by reference to the original bill, nor when, or by whom, or for what sum the same was confessed, nor that execution issued on said judgment, &c.

This demurrer appears to relate simply to the form of the bill of supplement, and I do not find any sufficient ground to sustain it. The bill is in the usual and approved form. It is not the practice to reiterate substantively in the supplemental bill, all the charges of the original bill, but to set them out by way of reference, and charge the new and additional facts by way of supplement.

The defendants take a distinction, however, between a case where the original bill is insufficient to warrant the particular relief prayed for, so that no decree can be made without the supplemental matter, and one where the supplemental facts come in, in aid of the relief sought. They appear to think that in the first case, all the facts should be re-charged in the supplemental bill, inasmuch as they cannot be legally put in issue by the original bill, because not being in themselves sufficient to make out the case of the complainant. But this would appear to be the conversion of a bill of supplement into an original bill, and variant from the practice. It cannot be necessary, unless the ori-

* See ante, page 258.

ginal bill is entirely defective; nor even then, for such bill cannot be aided by any supplement.

The real difficulty of the defendants appears to be, that if the demurrer is overruled and the supplement sustained, they will have no opportunity of answering and putting in issue the facts charged in the original bill. Supposing that bill to be insufficient, they have concluded there was no necessity for answering or pleading to it in any way. This was hazardous ground to stand on. If they considered the bill defective, it was their duty, if they meant to defend the suit at all, to demur to it, and have the question settled, and not suffer a decree to pass against them, and testimony to be taken. If they are in difficulty by reason of their own default, they are not entitled to any special favor.

I am not without doubt, however, as to the correctness of the practice pursued in this case. It was adopted on the authority of *Candler* v. *Pettit*, 1 *Paige*, 168, and with some hesitation. I perceive now, on further reflection, that it may lead to some embarrassment, especially where proofs have been taken exparte. Under these circumstances, and seeing that this bill has been filed by the permission of the court, I think the proper course will be for the defendants to apply to have the decree pro confesso vacated, and for leave to answer upon such just and equitable terms as the court should direct. This will be giving them an opportunity to contest the cause on the merits, which is all they can desire. The complainant ought not to object to it, for he was distinctly apprised at the commencement of the suit, when he applied for an injunction to prevent a sale of the personal property under the Wilkinson judgment, that the bill, so far as related to the relief prayed for against that judgment, was not sufficient.

Order accordingly.

Hugh Capner v. The President and Directors of the Flemington Mining Company.

If an injunction bill has been actually sworn to, the injunction will not be dismissed because the master has omitted to sign the jurat.

The operations of large companies should not be arrested by injunction, without notice, except in very plain cases, or where there is a pressing necessity for immediate action.*

A charge of waste, whereby the mortgage security is diminished, is always a sufficient ground for an injunction as between mortgagor and mortgagee.

Where a farm has been purchased, and is occupied for mining purposes, any necessary or proper use of the property in mining operations is not waste.

Bill by a mortgagee against the mortgagors, to restrain the commission of waste. On filing the bill an injunction was issued by order of a master, made exparte, and without notice to the defendants. The defendants, before answer, moved to dissolve the injunction as irregular. The cause was heard on the motion to dissolve.

Saxton, for defendants, in support of the motion.

Wurts, contra.

The Chancellor. In eighteen hundred and thirty-four, Capner sold his farm to the Mining Company for forty thousand dollars, payable in installments. Thirteen thousand five hundred dollars of this has been paid, in money and stock. An installment of eight thousand five hundred dollars fell due on the first of March, eighteen hundred and thirty-six; on the payment of which, and securing the balance by bond and mortgage on the premises, full possession of the whole property was to be delivered to the Company. Previous to this, Capner was to have the use of the farm for agricultural purposes, while the Company

* Accord. *Ross* v. *Elizabeth-Town and Somerville Railroad Company*, 1 *Green's Chan. R.* 422; *Perkins* v. *Collins*, post.

were at liberty to carry on their mining operations, open shafts and dig for ore, &c. as they might find advantageous. It was stipulated in the agreement between the parties, that in case the payment of eight thousand five hundred dollars, due on the first of March last, should not be made, that Capner, besides other remedies against the Company, should, by reason of the default, have all the remedies of a mortgagee against a mortgagor in this state for the mortgaged premises, upon non-payment according to the conditions of the mortgage, so far as they can be applied to enforce the payment thereof. The payment not being made, Capner filed a bill to foreclose all the rights and equities of the Company, and for possession; and also for an injunction to prevent the commission of waste. The injunction was ordered by a master, *exparte;* and it is now moved to set it aside as irregular, on several grounds.

1. The first is, that the bill was not properly verified.

The affidavit was drawn out at the foot of the bill in the usual way, and signed by the complainant, but the jurat was not signed by the master. Such an omission should not vitiate the injunction, if the bill was actually sworn to, as was the fact. It was an omission of the court, but one which could not affect the interests of the defendants. Perjury could have been assigned upon the affidavit if the facts were untrue.

2. The injunction, it is contended, was granted without notice, and therefore irregular.

There is no general rule on this subject; but the operations of large companies should not be suddenly stopped without an opportunity of being heard; and it has been usual for the court to cause notice to be given, except in very plain cases, or where there was a pressing necessity for immediate action. There is a discretion which the court must exercise in every case. If the operation of this injunction had been entirely to prevent the Company from working their mines, I should have been inclined to set it aside, on the ground that there was not a case of pressing necessity, and that the defendants were entitled to notice. But the injunction does not go that length. It does not prevent the

defendants from working in the shafts already opened, and cannot, therefore, be accompanied by any lasting or wide-spread injury, though it may occasion temporary embarrassment or inconvenience. I do not think proper to disturb the injunction on this ground.

3. It is contended that there is no equity in the bill to sustain the injunction.

There is waste charged, so as to diminish the complainant's security, and that is always a sufficient ground for an injunction as between mortgagor and mortgagee. I am of opinion, however, that there has been a misapprehension as to what constitutes waste under the facts of this case, and the peculiar situation of these parties.

This property was purchased and is occupied for mining purposes. This is evident from the price to be given, and all the covenants. So far as is necessary or proper for these purposes, the Company are in possession by permission not only, but of right, and any use of the property in mining operations cannot be considered as waste. It is not charged that they are using it ignorantly, or in such way as intentionally to injure the complainant without any benefit to themselves; nor is it pretended that the mines are wholly unproductive, or that the property is really valueless except for agricultural purposes, and that therefore, if the Company is permitted to go on *ad libitum*, excavating and searching for ore, that the property will be entirely lost to the complainant as a farm. The injunction does not rest on either of these grounds, and I am at a loss to conceive how the Company can commit waste and spoil, by using the property in the mode agreed on by the contract. Suppose the eight thousand five hundred dollars had been paid in March, and Capner had taken a mortgage for the balance of the purchase money, and it was not paid at the time stipulated, he might have filed a bill to foreclose the equity of redemption, but he could not have prevented the Company from using the property in their mining operations. Coming in here at this time as a mortgagee, he has no better rights.

The case of *Den* v. *Kinney*, 2 *South.* 552, is analagous to the present. The lessor of the plaintiff had covenanted to convey to the defendant a furnace property, and put him in possession. The purchase money not being paid, an ejectment was brought, and an application was made for a rule against the defendant to stay waste. It appeared that several hundred cords of wood had been cut, but the court said that as the use of the wood was for the common purposes of the estate, it was not waste; that the land being annexed to a furnace, it was only using it in the ordinary mode; and the rule was refused.

I am of opinion that in this case the injunction should be modified; that so far as it restrains the Company from opening new shafts and digging for metals or minerals at any other point or place than where they were engaged at the time of filing the bill, and spreading over the premises the earth excavated, and removing or carrying away from the premises any ores, minerals or metals, it should be set aside. So far as it restrains the Company from moving or carrying away any fixtures, buildings, fences or other erections, it should be retained. The other part of the injunction, which prohibits the defendants from cutting down or injuring any timber or trees, or pulling down any fences, or interfering with and disturbing the complainant and his agents while engaged in their lawful avocations and business in and about the said premises, and obstructing their peaceable ingress and egress to and from thence, must be so modified as to apply only to acts out of the ordinary course of the lawful business of the Company, and done for the purpose of harassing and injuring the complainant.

Let the injunction be modified so as to conform with these directions.

JANE DEHART v. JOHN DEHART, Surviving Executor of JOHN DEHART, deceased, and others.

Where a suit is brought by a residuary legatee, for a settlement and distribution, all the residuary legatees, or their representatives, must be made parties.

And the rule will not be dispensed with, though one of the residuary legatees has died, leaving his estate insolvent, and no administrator has been appointed.

Where one of two co-executors has died, his representatives are not necessary parties to a bill against the surviving executor for settlement and distribution.

HEARING on demurrer for want of proper parties.

E. Vanarsdale, for defendants, in support of the demurrer.

I. H. Williamson, contra.

THE CHANCELLOR. Jane Dehart, the complainant, is a residuary legatee under the will of John Dehart, deceased; and has filed her bill against the surviving executor, among other things, for a settlement of the estate, and for satisfaction of her share of it as a residuary legatee.

John Dehart, the surviving executor, and James B. Clark, have demurred to the bill for want of parties.

It appears by the bill that John and Jacob Dehart, two of the sons of the testator, were appointed executors in the will, and that both proved the will; and also, that Jacob was the acting executor, and had the principal management of the estate. He died without leaving a will, and insolvent, and no administration has been taken out upon his estate.

It appears, also, that Stephen, another of the children, is dead, and that his widow and Jacob Dehart administered upon his estate. Jacob is dead, and it is charged that the widow afterwards married again, and left the state of New-Jersey, and has not been heard of for many years, and is now believed to

be dead; and there is no person to represent the estate as the personal representative of the said Stephen.

The demurrer is sought to be sustained on two grounds:—

1. That there is no personal representative of Jacob before the court, he being a co-executor, and also a residuary legatee; and,

2. That there is no personal representative of Stephen before the court, he being a residuary legatee also.

It is not necessary for the complainant to bring a representative of Jacob before the court, on the ground of his having been a co-executor. On his death, the duty of settling the estate devolved upon John, the surviving executor; and it is charged in the bill, that John thereupon took possession of the books and papers of the said Jacob relating to the estate of John Dehart, deceased, so that he was fully able to make the settlement. The personal representatives of Jacob Dehart, he dying without a will, are not representatives of the estate of John Dehart. They have no concern with it, other than to surrender the assets into the hands of the surviving executor; and under this bill the legatees have no concern with them. If it should appear that Jacob and John, the two executors, were not jointly liable, but had so conducted the business of the administration as to be severally accountable for distinct portions of the estate, and that the estate of Jacob was indebted to that of the testator, it might be important, if a proper case were made, to bring in the representative of the estate of Jacob, to charge him with the amount due from his intestate. But there is no such case presented; and the complainant, in proceeding in the ordinary way against the surviving executor, has done all that was necessary for her to do.

2. Upon the other ground, I think the demurrer is well taken. It is a familiar rule, that where a suit is brought by a residuary legatee, for a settlement and distribution, all the residuary legatees must be made parties, and especially where an interest is claimed out of real estate, which is the case now before the court: *Parsons* v. *Neville*, 3 *Bro. C. C.* 365; *Cockburn* v. *Thompson*, 16 *Vesey*, 329; *Morse* v. *Sadler*, 1 *Cox's*

C. R. 352; *Brown* v. *Rickets*, 3 *John. Chan. R.* 553; *Davoue* v. *Fanning*, 4 *John. Chan. R.* 199; *West* v. *Randall*, 2 *Mason*, 197. This grows out of the great principle, that in equity, all parties in interest, upon whom a decree may or ought to operate, should be before the court, that their rights may be settled, and an end be made to litigation. This principle is one of great convenience in the administration of justice. It is peculiar to the chancery jurisdiction, and forms one of its distinctive and most valuable features: 1 *Story's Eq.* 28. Still the principle, as applicable to general cases, is not inflexible. It may be dispensed with, when it is impracticable or very inconvenient to enforce it: *Wiser* v. *Blachly*, 1 *John. Chan. R.* 437; 2 *Mason*, 197.

In a case like the present, where the complainant seeks a final settlement and distribution of the estate, it is important that one investigation should conclude all who have an interest; and as those who are not parties cannot be bound by the decree, (*Gifford* v. *Hort*, 1 *Sch. and Lef.* 386,) there should be no dispensation of the rule except for necessary cause. In the case of Jacob, it is alleged that his estate is insolvent and that no administrator has been appointed. This is not a sufficient excuse. The estate, though insolvent, has a distinct interest. If the complainant is entitled to a residuary share, the estate of Jacob is, for aught that appears, entitled to an equal share; and the decree, to be effectual, should bind that estate. The residuum is to be divided into equal shares; and in making the division, the estate of Jacob cannot be overlooked. The fact of its insolvency will not authorize the court to pass over it in the distribution; and if it is to be benefitted or affected by the decree, so materially, it should be represented before the court.

There is no necessity for dispensing with the rule in a case like this. There is no great inconvenience in taking out letters of administration on the estate of Jacob, nor in bringing the personal representatives of Stephen before the court. I am of opinion that this should be done, and shall accordingly allow the demurrer.

FREDERICK DEPEYSTER, jun. and THOMAS L. OGDEN v. SARAH C. GOULD and others.

If a purchaser at a sheriff's sale of mortgaged premises, sold by virtue of a decree for the satisfaction of the mortgage debt, purchase as agent for and at the request of the complainant, and take a deed in his own name, without paying any part of the purchase money, a resulting trust is raised in favor of the complainant.

The receipt in a deed is not conclusive, and where an actual question is raised as to the payment of the consideration, parol evidence may be resorted to, to show by whom it was advanced.

Attaching creditors do not stand on the same footing as *bona fide* purchasers. The latter are entitled to protection on account of the payment of a present consideration without notice; but the rights of third persons are not affected by an attachment or a judgment, though the attaching or judgment creditor may not be affected with notice.

E. Wood and *G. Wood*, for complainants.

Gifford and *W. A. Van Hook*, for defendants.

THE CHANCELLOR. Lewis Compton and wife, on the fifteenth of April, eighteen hundred and twenty-three, gave to Frederick Depeyster a mortgage on several lots in Perth Amboy, to secure the payment of fifteen hundred and fifty dollars, due from Compton to Depeyster. The mortgage having been duly recorded, was afterwards placed in the hands of one of the solicitors of this court for collection. While there, Depeyster, being indebted in the sum of three thousand dollars to the Protestant Episcopal Society for promoting Religion and Learning in the State of New-York, of which he had been many years treasurer, gave his note for that amount to John Onderdonk, Martin Hoffman, (both since deceased,) and Thomas L. Ogden, acting as trustees on behalf of said society, and assigned over to Frederick Depeyster, junior, by way of collateral security for the payment of the said debt, certain securities, among which was the mortgage aforesaid with the accompanying bond. The as-

signment was in trust, to collect the principal sums and the interest thereon, and therewith to pay off and discharge the said debt; and to pay over the balance, if any, to the said Depeyster, the assignor. A bill was filed, to foreclose the mortgage, in this court, and a decree had; and the property was sold by the sheriff of the county of Middlesex, and purchased by Frederick Depeyster, as agent and in behalf and at the request of Frederick Depeyster, junior, who was then absent in Florida, for the sum of thirteen hundred dollars. The deed was made to Frederick Depeyster, senior, and recorded.

The purchase was made by Frederick Depeyster, senior, not on his own account or benefit, but on behalf of Frederick Depeyster, junior, the assignee, in trust, and of the society aforesaid. The purchaser did not pay the sheriff the amount of the bid or any part of it, nor was it intended to be a charge against him, but was a credit to the mortgagor, and the purchase was really and in fact for the benefit of the assignee of the said mortgage, and those beneficially interested therein. Frederick Depeyster, junior, took possession of the premises, and leased them for eighty dollars per annum, in the name of Frederick Depeyster, senior, he being the formal owner of the legal estate, and has received the rents and profits, and accounted for them to the treasurer of the society aforesaid. After collecting all the monies that can be recovered on the other securities assigned, (except thirty or forty dollars,) there is a balance still due on the note given to the trustees of the said society, of two thousand and seventy-four dollars and seventy cents, or thereabouts.

In eighteen hundred and thirty-one, Sarah C. Gould, of the island of St. Croix, attached the premises as the property of Frederick Depeyster, senior, and such proceedings were thereupon had under the attachment, that in February, eighteen hundred and thirty-two, judgment was entered in favor of said Sarah C. Gould for four thousand five hundred and forty dollars and seventy-five cents; in favor of Matthew Clarkson and Catharine E. his wife, David F. Clarkson and John Clarkson, for fifteen hundred and fifty-eight dollars and sixty-five cents; and in favor

of William D. Green, administrator, &c. of Ann E. his wife, Frederick Depeyster Crommelin, Harriet Depeyster Crommelin, Mary A. Crommelin, Julia R. Crommelin, and Sarah M. Crommelin, administrator of Charles I. Crommelin, deceased, for two thousand four hundred and thirty dollars and twenty-eight cents.

The bill then charges, that the said attaching creditors, notwithstanding they have been made acquainted with all the facts above set forth, intend to proceed in their attachment and sell the mortgaged premises, and thereby annoy and attempt to defeat the equitable rights and interests of the said society, and throw a cloud over the title of the complainants.

The complainants pray an injunction, to prevent any sale under the attachment; and a decree that Frederick Depeyster convey the said premises to the complainant, Frederick Depeyster, junior, in trust for the said society; or that the society may be decreed to have a lien on the premises for the amount of the purchase money, in preference to any lien of the attaching creditors, and that the premises be sold, and the proceeds applied to the payment of the said lien, &c.

On filing this bill an injunction issued.

The answer of Sarah C. Gould is merely formal, neither admitting nor denying the principal facts set forth in the bill.

The Clarksons have filed no answer, their claims having been purchased in by one of the complainants.

The other defendants insist, that Frederick Depeyster, senior, purchased the property on his own account; and in support of the insistment, they place themselves upon the fact that Frederick Depeyster, junior, leased the property to a tenant in the name of Frederick Depeyster, senior, for eighty dollars per annum, and expressly on his behalf as the owner. They claim to stand in the situation of bona fide purchasers without notice of the alleged trust, or of the alleged non-payment of the purchase money for the premises; and insist that the purchase money is not a valid or subsisting lien upon the said premises as against the attaching creditors; and that, if the said trustees had any available interest in the premises, it can only constitute a charge against the said

Frederick Depeyster. They charge, that Frederick Depeyster, junior, paid over no rent till March, eighteen hundred and thirty-two, which was long after the issuing of the attachment; and that Frederick Depeyster, senior, has repeatedly endeavored to sell the property by private contract, and assumed and exercised the ownership of it absolutely and for his own benefit, and that he did not hold it in trust. They further insist, that they are lawfully and equitably entitled to have the property sold to satisfy their debt, &c.

No replications are found among the papers, but the parties have proceeded to take testimony and produce exhibits; and the cause has been submitted in briefs.

It is proved, that Depeyster the elder, purchased the property at sheriff's sale for thirteen hundred dollars. It is also proved, that he attended the sale with the intention, previously expressed, of taking care of the interests of his son, the trustee, who was then absent, and of preventing a sacrifice of the property. On the day before the sale he came to the office of William Johnson, the treasurer of the society for whose benefit the sale was to be made, and mentioned the absence of his son, and that some person ought to attend on his behalf. Depeyster was interested in the sale, and it was natural that he should feel solicitous that the property should not be sold for a nominal consideration.

It is proved that no part of the rents and profits of this property ever came to the hands of Frederick Depeyster, senior: they were received by the trustee, and, after paying costs and repairs, were paid over to the treasurer of the corporation, according to the trust.

I think it also appears satisfactorily, that Frederick Depeyster, senior, paid no part of the consideration or purchase money. His pecuniary situation at the time, is strongly against the supposition. He was embarrassed and insolvent, and there is nothing to lead to the belief that he advanced any part of it. The relative position of the parties was such as to preclude the idea. He would not pay the purchase money without buying in his own right. He could not buy in his own right without being guilty

of fraud. He gave out his intention to attend on the part of his son, and buy the property in, if necessary to prevent a sacrifice; and if he had purchased the property for himself and paid for it, it would have been in violation of duty, and in bad faith. The docket of sheriff Edgar is proof that no purchase money was paid by Frederick Depeyster, senior. The suit stood in the docket in his name as complainant. In May, eighteen hundred and twenty-nine, he purchased for thirteen hundred dollars, and it is so entered. In April, eighteen hundred and thirty, he acknowledges to have received his deed as purchaser, and discharges the sheriff from any further liability. It is evident from this that no money passed. Depeyster being plaintiff and purchaser, the amount of the purchase money was so much raised on the mortgage. There was no need of payment. The sheriff considered him as the owner of the mortgage, and he being entitled to the proceeds of the sale, it was only necessary that he should acknowledge himself the purchaser, and discharge the sheriff.

The defendants insist on a variety of circumstances to show that the purchase was made by Depeyster for his own benefit, and that it was assented to by the son. They say, that, although the property was sold to Frederick Depeyster in the absence of the trustee, his son, yet he permitted the father to take the deed after he returned home, and to have it recorded. It would have been much better to have corrected the inadvertence or mistake at an early stage of the proceedings. The deed should have been taken in the name of the trustee; and I do not see that any very satisfactory reason is assigned why it was not so done. Still the omission to do it does not warrant the conclusion that Frederick Depeyster, junior, thereby admitted that the beneficial title was in his father. He had given in his own name to the sheriff as purchaser, and it was right that the deed should be made out to him accordingly. His son had expressed his surprize that this should have been done. It was alleged to have been an inadvertence, and the trustee appears to have been satisfied, not anticipating any difficulty. It is a matter of surprize, however, that such an omission should have occurred, and it casts a shade

over this part of the complainant's case. It may be that Mr. Depeyster, junior, thought the sheriff might have some difficulty in making out a deed to a third person, when the fact of the agency was not communicated to him at the time of sale, and when the purchase money was not to be paid by such third person on receiving the deed. The sheriff certainly would not have done it, unless he could have been perfectly satisfied as to the assignment, the trustee, and the nature of the trust; all of which were matters he was under no necessity of inquiring into. It was his business to make the deed to the purchaser, on receiving the money or a discharge from the plaintiff. If such was the reason why the trustee interposed no objection to the deed being made to his father, it was a very natural one, and it would have been easy to have said so. No such reason is assigned.

The fact that in eighteen hundred and twenty-nine, Frederick Depeyster, junior, leased the property as agent for his father, is brought forward to show the understanding of all parties that the purchase was not made by F. Depeyster, senior, as agent; and it is a circumstance entitled to some consideration. It was before the deed was made by the sheriff, and the legal title had not passed. This is susceptible of the same explanation as the one last adverted to. And in addition to that, it is proved that F. Depeyster, junior, the trustee, accounted for the use of the property to the treasurer of the society before mentioned. The first accounting was in November, eighteen hundred and thirty, which was before the attachment was sued out; and it is a satisfactory answer to the allegation, that the rents and profits were not accounted for by F. Depeyster, junior, until after the attachment, and was then resorted to as an expedient to cover over the truth of the case.

There are some other matters of minor importance which might be noticed, such as the receipt of the money in the sheriff's deed, and the offers to sell the property made by F. Depeyster, senior, but they are all susceptible of explanation. The receipt in the deed is not conclusive; and where an actual question is raised as to the payment, parol evidence may be resorted to to

show by whom it was advanced: *Sugd.* 598, 6th edition; *Jeremy's Eq.* 87. The whole of them taken together, do not compare with the evidence adduced to prove, that the property was bought by F. Depeyster for the use of the trustee and the society, and was so held. Nor do they at all affect the proof that no consideration was paid for the property by the purchaser.

The fact that the consideration was paid by the trustee, or that it came out of his mortgage, is satisfactory; and it raises a trust by implication of law—a resulting trust—in favor of the complainants. Trusts of this nature, says lord Hardwicke, are, where the legal interest is in another, but the purchase money has been paid by a third person. This is a resulting trust for him who paid the money: *Willis* v. *Willis*, 2 *Atk.* 71; *Lloyd* v. *Spillet and al.*, 2 *Atk.* 150. The ground of this doctrine is, that he who paid the consideration is to be deemed the owner of the land, unless other presumptions arise to repel the conclusion: *Powel and ux.* v. *Monson and Brimfield Manufacturing Co.*, 3 *Mason*, 347. And the fact and manner of paying the purchase money may be proved by parol, as well when the consideration is stated in the deed to have been paid by the nominal purchaser, as when it is not; and it may be done either before or after his death: *Boyd* v. *M'Lean*, 1 *John. Chan. R.* 582; *Botsford* v. *Burr*, 2 *John. Chan. R.* 405; *Lench* v. *Lench*, 10 *Vesey*, 511; *Jeremy's Eq.* 87; 3 *Mason*, 347, and the cases there cited.

This, then, is a resulting trust. The consideration was paid at the time by the credit on the mortgage; which credit, whether actually made or not, the mortgagor was entitled to receive upon the plainest principles of equity, and the mortgagee was, on the same principles, bound to allow. And therefore the objection, that there was no money actually paid at the time, can have no force.

The complainants are entitled to the benefit of this trust, unless it be true, as insisted on by the defendants, that they had no knowledge of it, and therefore stand, under their attachment, in the situation of bona fide purchasers for a valuable consideration,

without notice. If this be so, their equity is superior to that of the complainants, and must prevail. But on this subject the defendants have misapprehended the law. Attaching creditors do not stand on the same footing as bona fide purchasers. These last are entitled to protection on account of the payment of a present consideration without notice. But attaching creditors are seeking to recover an old debt, and the rights of third persons are not affected by the attachment, (or by a judgment for the same reason,) though the attaching or judgment creditor may not be affected with notice: *Finch* v. *Earl of Winchelsea*, 1 *P. Wms.* 277; *Stevenson* v. *Pemberton*, 1 *Dal.* 3.

Upon the whole, I am satisfied that the equity of the case is with the complainants, and that the injunction heretofore granted should be made perpetual. As there is no evidence before me of the value of the property, and it may be worth much more than the thirteen hundred dollars, or even the whole amount due the Society, I shall decree that the property be sold under the direction of one of the masters of the court, and the proceeds be appropriated to satisfy, in the first place, the costs of this suit on the part of the complainants, and then to satisfy the balance of the Society's claim against Frederick Depeyster; and that the residue, if any, be brought into court for the use of the attaching creditors. The defendants are to pay their own costs; and they are exempted from the payment of costs to the complainants, on the principle that they had good ground for the attachment, there being no notice of the trust; and that being called into this court, there was reasonable ground for contesting the matter here, even after notice of the trust, growing out of some omissions of the complainants which are not well explained.

Decree accordingly.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW-JERSEY.

OCTOBER TERM, 1836.

JAMES PERKINS v. SAMUEL B. COLLINS and others.

* Though the operations of large companies ought not ordinarily to be arrested by injunction without notice, yet it is a matter resting in the sound discretion of the court; and if a master, in the exercise of his discretion, has allowed the injunction without notice, the chancellor will not therefore, as of course, dissolve the injunction, although he might have exercised the discretionary power differently.

It is expedient, but not essential to the validity of an affidavit, that the place where the affidavit is taken should be inserted in the jurat.

The place of taking an affidavit is a matter *in pais*, and if legally questioned must be proved *aliunde*.

Where the complainant in an injunction bill relies on his own oath, the charges in the bill, and the affidavit to verify them, should be direct and positive. They must not be such as can only be made sufficient by the aid of presumption.

In all cases of waste or nuisance, it must appear clearly that the party has personal knowledge of the material facts charged, or he must produce supplemental proof.

An irregularity in the bill or affidavit upon which an injunction is allowed, is

* Accord. *Rose* v. *Elizabeth-Town and Somerville Railroad Company*, 1 *Green's Chan. R.* 422; *Copner* v. *Flemington Mining Company*, ante, 467.

[Perkins v. Collins et al.]

not waived by filing an answer and moving to dissolve the injunction, if the answer is not relied on in support of the motion to dissolve.

If an injunction is allowed upon an insufficient affidavit, it is not merely an irregularity, but an error, to which the principle of waiver does not apply.

A deficiency in the verification of the charges in the bill, cannot be supplied upon the hearing of a motion to dissolve the injunction.

MOTION to dissolve an injunction as improperly granted, after answer filed. It appears by the answer, that the nuisance complained of was occasioned by the defendants excavating and preparing a race-way, for the purpose of creating a water-power for manufacturing operations. The opinion was delivered in the vacation preceding the term of October, A. D. eighteen hundred and thirty-six.

Wall, for defendants, in support of the motion.

Scott, contra.

THE CHANCELLOR. The bill prayed an injunction against the defendants, to restrain them from excavating and digging up certain highways or streets in the city of New-Brunswick, opposite to two several lots and houses in the possession of the complainant's tenants. It charged, substantially, that the complainant was the owner of a long term of years yet to run, and possessed of an estate in two certain lots of land and premises with dwelling-houses upon them, which now are and for some time past have been occupied by his tenants, and that his estate in the same is very valuable;—That the street or highway fronting said property then was, and for a long space of time had been, used as a highway, and had been the grand avenue and entrance into the city of New-Brunswick, for more than fifty years;—That the defendants, without any right or lawful authority, have commenced, and threaten to complete and finish, a certain nuisance to the complainant, and did actually begin, on the ninth day of June, to excavate and dig the highways and streets opposite the complainant's houses, and threaten entirely to cut and open such

an excavation in the said highway, near to the place of the confluence of Neilson and Water streets, as totally to prevent all access by means of the said streets, or through the same, to the said houses and lots;—That they are actually engaged in excavating the said streets, and if permitted to proceed and carry out their intentions, the evil will be irremediable.

Upon this bill, as verified by the complainant, and explained by a map or diagram of the premises made by a surveyor, which was appended to the bill as a part of it, an injunction was ordered by an injunction master of the court, on the fourteenth of June last; and it is now moved, on the part of the defendants, to set aside and dissolve the injunction on various grounds.

And it is insisted, in the *first* place, that the injunction should be set aside, it having been issued on an exparte application, without notice.

This objection is founded on the idea, that there is a rule requiring notice of these applications to be given in certain cases. It is a mistake. There is no rule requiring notice to be given in any case, until after answer filed; and it was so declared in the late case of *Capner v. The Flemington Mining Company*. It has been the practice not to grant injunctions exparte, where the operations of large companies, such as manufacturing, mining and banking companies, in which the public are supposed to be in some degree interested, must be suddenly stopped, without notice and an opportunity to be heard. But it is a matter resting in the sound discretion of the court, and must necessarily be so, that the ends of justice may be effectually answered. A short delay may, in some instances, be sufficient to consummate the injury, and place the whole matter out of the reach of the preventive remedy of the court. In the case of *Tichenor* v. *The Morris Canal and Banking Company*, where a plain and open encroachment was set out in the bill, an injunction was ordered without notice. The very fact, that in every instance where notice has been given, it has been done under the order of the court, is the best evidence to show that there is no positive rule on the subject. In this case the master, acting for the chan-

cellor, has exercised the discretion with which he was clothed according to the best of his judgment; and even if the chancellor would have exercised it differently if present, it does not follow that the injunction must therefore be set aside. No statute has been violated, nor any rule of practice; and it would require a strong case to induce such an interference, on a mere difference of opinion in a matter resting in the discretion of the officer.

The *second* objection is to the sufficiency of the affidavit, and the verification of the bill. And this objection is two-fold:— 1. That the place where the oath was taken is not mentioned. 2. That the affidavit is defective in form and substance.

1. As to the *jurat*. It has been repeatedly recommended by the court, that the place should be inserted in the jurat. It is convenient and safe, and may be very important to the ends of justice; but I cannot concur in opinion that it is essential to the validity of the affidavit. The officer before whom the affidavit was taken is an officer of this court, and his authority to administer oaths in all proper cases, is coextensive with the bounds of the state—as much so as that of the chancellor. The caption of the affidavit is, "State of New-Jersey, ss.," and that is sufficient prima facie, to show to the court that the act was done within the state. The dictum, as given in *Halsted's Digest*, 174, is not satisfactory; and certainly has not been followed so far as to exclude affidavits in which the place was not stated. It probably grew out of the practice which some years since obtained for a short time, of granting special commissions to masters, whereby their authority was limited to the counties in which they respectively resided, as is the case with that of the masters extraordinary in the English chancery. That practice no longer prevails. All masters appointed since eighteen hundred and twenty-nine, are commissioned generally. The order in chancery of lord Clarendon, cited from the *Prac. Reg.* 5, has relation to these masters extraordinary, who were officers of special and limited jurisdiction, and is entitled to no weight in determining the present question: vide 1 *Har. Prac.* 17. It would seem also, that ac-

cording to the practice in New-York, the county where the affidavit is taken must be expressed in it: 1 *Hoff. Prac.* 426; but this may be accounted for on the principle that in that state affidavits to be read in chancery may be taken before local and county officers, and therefore the reason of lord Clarendon's order will well apply. The place of taking an affidavit is a matter *in pais*, and if legally questioned must be proved *aliunde*.

This first branch of the objection is overruled.

2. The second part is, that the affidavit is defective in form and substance, and therefore that the bill is not properly verified.

The affidavit is in these words: "State of New-Jersey, ss. James Perkins, the complainant in the above bill, being duly sworn according to law, on his oath saith, that the matters and things set forth and charged as of his own knowledge, are true; and those which are set forth as received from others, and of which the complainant was informed, he believes to be true."

This affidavit differs from every form in use. It is special and peculiar, and taken in connection with the manner in which the facts are charged in the bill, it is radically defective. The bill is not verified so as to warrant an injunction.

On looking into the bill, it appears that no part of the facts are charged as of the knowledge of the complainant; nor are any of them charged as having been received from others, or of which the complainant was informed. In what sense are the charges in this bill to be taken? Are they to be taken as made on the knowledge of the complainant, or on information derived from others? Some of them may be within his own knowledge, but as to others no such supposition can be made. When he speaks of the excavation in the street, he may speak of his own knowledge; but when he states that the street has been the grand avenue into the eastern part of the city for more than fifty years, he cannot be presumed to speak from personal knowledge.

It may, perhaps, be thought, and it was so argued, that where a complainant makes a positive charge, he must be considered as making it of his own knowledge. There is some plausibility

in the position; but it is unsafe, and the supposition can never be made where the facts, or some of them, are such as the party could not have been personally cognizant of. But if such general presumption might be made in ordinary cases, it surely should not in this. Here the complainant comes into court stating himself to be a non-resident. He lives in the city of New-York. He says he is owner for a term of years and possessed of an estate in two certain lots and houses, and that these are in the actual occupation of his tenants. He alleges no actual possession, but the contrary; and his residence is forty miles distant. When, therefore, he makes charges that the defendants are excavating the streets, are we to presume that they are made of his own knowledge? When he states that they threaten to proceed, must it be taken that the threats were made to him? If we are to go upon presumption, is it not more reasonable to conclude that he has derived most of the facts charged from information received from others?

But without pursuing these inquiries, it may be laid down as a settled principle, that in cases of this description, where the court exerts its most delicate, and at the same time its most potent authority, and that too upon the single affidavit of an interested party, the charges in the bill, and the affidavit to verify them, should be direct and positive. They must not be such as can only be made sufficient by the aid of presumption. I speak now of cases where the party relies upon his own oath. There should be no room for doubt or cavil. The reason for this strictness is obvious. The consequences of an injunction are often most serious and distressing to the party injoined; and when once properly issued, the defendant is required to answer the whole equity of the case, and that directly and of his own personal knowledge; and if his personal knowledge is not sufficient, he cannot make up the deficiency by affidavits, but must submit until a hearing can be had upon the merits.

Seeing the manner in which this bill is drawn, and the peculiar situation of the complainant as set forth in it, I am of opinion that even his verification of the bill in the ordinary form

would have been insufficient to warrant an injunction. In all cases of waste or nuisance, it must appear clearly that the party has personal knowledge of the material facts charged, or he must produce supplemental proof. There being no special charge in this bill of the party's knowledge, he should have made a special affidavit, or called to his aid the testimony of others.

As the matter is now presented, the verification is not sufficient.

It is contended, however, that this is at most but an irregularity, and is cured by filing the answer and the motion to dissolve.

A mere irregularity may be submitted to, and waived by the party affirming it by his own act: *Travers and al.* v. *Stafford*, 2 *Vesey*, 23. What constitutes such affirmance, is the question. The defendant applying for time to answer is not sufficient: 2 *Vesey*, 23, same case. Putting in answer and moving to dissolve, has been held sufficient: *Davile* v. *Peacock*, *Barnard. Ch. R.* 27. This means, moving to dissolve upon the answer. The party thereby puts himself upon the merits, and affirms the previous proceedings. But there is no case which goes so far as to say, that simply the putting in of the answer is an affirmance of the injunction; and if it be not, then a motion to dissolve after answer filed, but without relying on it in any way, will not be. That is the present case. The answer has been filed, and before notice of the motion to dissolve. But the defendants have not relied on it, nor were they bound to do it: *Rev. Laws*, 495. They have not, as I conceive, waived any of their rights, even if this is to be considered a case of irregularity merely.

I am inclined to the opinion, however, that this is not a question of mere irregularity. The order for the injunction, and the process itself, were founded on an insufficient affidavit, and, strictly speaking, they are not irregular but erroneous, and the principle of waiver cannot save them: *Levi* v. *Ward*, 1 *Sim. and Stu.* 334; 1 *Cond. Ch. Rep.* 170.

It was offered at the hearing to supply the deficiency in the verification, if any existed. I was induced to think favorably of

the proposition at the moment, but reflection has satisfied me that it would be a dangerous precedent to make. If the party may amend and enlarge his affidavit at the hearing, and cover its defects, why may he not amend the charges in his bill, if he discover them to be deficient, or why may he not introduce the supplemental affidavits of third persons? There is no difference in principle, and yet such a practice could not be tolerated any more than it would be permitted to a plaintiff at law to supply any deficiency in an affidavit to hold to bail.

Without noticing, therefore, the other objections, all of which were of grave import, I shall order the injunction to be set aside, upon the ground that the bill was not properly verified.

Order accordingly.

GEORGE WINTERMUTE and JOSEPH R. WINTERMUTE, Ex'rs of PETER WINTERMUTE, deceased, v. WILLIAM SNYDER and ANDREW LITTLE, Surviving Ex'rs of JOHN SNYDER, deceased, and GEORGE SNYDER and others, the children and heirs at law of WILLIAM SNYDER, deceased.

A testator by his will gave and bequeathed to his wife his real estate, and so much of his personal as she might choose to take, to be held and enjoyed by her during her natural life. He then ordered, that after the death of his wife, his personal and real property should be sold and divided, two thirds to his own relations, and one third to his wife's relations; "that is to say, the two thirds shall be divided, share and share alike, between the heirs of J. S., W. S. and his heirs, and P. S. and his heirs; and the one third shall be divided between A. M. and his heirs, and M. the wife of J. M. and her heirs." The division was ordered to be made by his executors within a reasonable time after his wife's death, not to exceed three years. *Held*,

1. That the legacies over after the death of the testator's wife, vested on the death of the testator.
2. That the heirs of J. S. (who was dead) should represent their father and take one share among them, and that W. S. and P. S. should each take one share absolutely, and not equally with his children.

A legacy to A. and his heirs, is an absolute bequest to A.

[Ex'rs of Wintermute v. Ex'rs of Snyder et al.]

Mere inadequacy of consideration is not of itself a distinct principle of relief. But palpable and excessive inequality in a bargain; inadequacy of consideration so gross as to shock the conscience, will induce equitable interference on the ground of fraud.

So where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud.

As a general rule, equity will not relieve against a contract merely on the ground that it was entered into by the parties under a mistake of the law.

Where an instrument is drawn and executed, which professes and is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman either as to facts or law does not fulfill that intention, or violates it, equity will correct the mistake so as to produce a conformity in the instrument to the agreement.

J. W. Miller and *I. H. Williamson*, for complainants.

Anderson and *Drake*, for defendants.

THE CHANCELLOR. The executors of Peter Wintermute, late of the county of Sussex, deceased, come into this court to enforce the payment to them of a legacy, which by the last will and testament of John Snyder, deceased, was bequeathed to William Snyder and his heirs; and which, after the death of the said John Snyder, the testator, was assigned over by the said legatee to the said Peter Wintermute, whose executors now claim.

The facts necessary to a proper understanding of the case are these:—John Snyder made his will in eighteen hundred and six, and having a wife, but no children, he bequeathed to his wife his real estate, and so much of his personal as she might choose to take, to be held and enjoyed by her during her natural life. He then ordered, that after the death of his wife, his personal and real property should be sold and divided, two thirds to his relations, and one third to his wife's relations; "that is to say, the two thirds shall be divided, share and share alike, between the heirs of Joseph Snyder, William Snyder and his heirs, and Peter Snyder and his heirs; and the one third shall

be divided between Andrew Metzer and his heirs, and Margaret the wife of Jacob Miller and her heirs." The division was ordered to be made by his executors within a reasonable time after the decease of his wife, not to exceed three years after her decease.

John Snyder, the testator, died in eighteen hundred and fifteen. His wife survived. In June, eighteen hundred and twenty-three, William Snyder assigned over to Peter Wintermute, all his share and interest in the estate of John Snyder, under the will aforesaid.

In eighteen hundred and twenty-seven, William Snyder died intestate, leaving children and heirs at law, all of whom are parties to this suit.

In eighteen hundred and thirty-two, Catharine Snyder, the widow, died; whereupon the surviving executors converted the whole estate into money, and in eighteen hundred and thirty-three settled their accounts in the surrogate's office of Sussex, and there was found to be a balance in their hands to be divided among the residuary legatees, according to the will, of twelve thousand one hundred and nineteen dollars and twenty-one cents.

Of this residuum, the complainants demand the one third part of the two thirds, which was given by the testator to his own relations; or, in other words, they claim the share which was bequeathed to William and his heirs; and they produce the assignment as evidence of their claim.

The executors and most of the heirs at law of William Snyder have answered the bill, resisting the claim thus made.

It is admitted by the solicitors that the testator had three brothers, Joseph, William and Peter. Joseph was dead when the will was made, and left nine children. William and Peter survived the testator, but both died, leaving children, in the life-time of the widow.

Before examining the assignment, the operation of which is a matter of dispute between the parties, it becomes necessary to settle in the first place, whether the legacies given under the will to the different legatees, vested on the death of the testator, or not

until the death of the widow; and if vested at the testator's death, then to ascertain what share William took under the will; whether the legacy to him and his heirs, is a legacy to him alone, in fee, or to himself and his children in equal shares; for it is contended by the defendants that the legacy was not a vested one, or if it was, that William took equally with his children.

As to the first point, I am clearly of opinion that the legacies vested on the death of the testator. The legacies are independent. They are subject to no contingencies, such as the attaining of a particular age on the part of the legatees, marriage, having issue, &c. Nor is there any limitation over. The time of payment is postponed, that the widow may enjoy the full benefit of the estate during her life time. Upon her death a division is to take place. The general rule appears to be well settled, that in all cases where payment is deferred on account of some interest in the subject being given to a person on whose death it is to take effect, the bequest is considered as independent of the time mentioned, and the legacy is vested at the death of the testator; but where time is annexed to the substance of the legacy, it does not vest before the period mentioned: *Hatch* v. *Mills*, 1 *Eden*, 342; *Monkhouse* v. *Holme*, 1 *Bro. C. C.* 298; *Attorney General* v. *Crispin*, 1 *Bro. C. C.* 386; *Walker* v. *Main*, 1 *Jac. and Walk.* 1; 1 *Rop. on Legacies*, 396; *Dawson* v. *Killet*, 1 *Bro. C. C.* 119, and the note, in which most of the cases are collated.

In this case, the time is not of the substance of the legacy. The testator intended that the relatives of himself and his wife, as designated in the will, should have his property. If his wife had not been living, he would have given it to them at once. Their right to it was not made to depend on any contingency annexed to the gift and constituting a part of it. The enjoyment was simply postponed for the benefit of another. The purpose of the testator was to give interests to different persons in succession. Each gift was alike immediate, though the second takers could not have the benefit until after the death of the first. This is the doctrine held by lord Eldon in *Blamire* v. *Geldart*, 16 *Ves.* 315. There the testator gave his property to his wife, and gave George

Pringle two hundred pounds at his wife's decease. Pringle died before the widow. The legacy was held to be vested, and the chancellor said, If the testator had given the stock to his wife for life, and at her death to George Pringle, it would have been clear that he would have had a vested interest in the nature of a remainder; and as she has clearly only a life interest in this portion of the stock, the legacy vested on the testator's death, and was not defeated by the death of the legatee, in the life-time of the wife. A nice distinction has been attempted in the books between ordinary legacies, and those which are residuary, but the same rule has usually been applied to both. And so, where the legacy is in the nature of a charge on real estate, a different construction has sometimes prevailed. It can have no effect on this case, however, for the testator contemplated that his executors should sell his real property and convert all into money, in the life-time of the wife.

This question has been settled in this court on more occasions than one, I appehend, but there is no report of it. It came up in the supreme court in the year eighteen hundred and eleven, in the case of *Fairly v. Kline*, 2 *Penn.* 754. In that case the testator gave his farm and some personal property to his wife during life or widowhood, and upon her death or marriage ordered his executor to make sale of the whole, and gave the proceeds, after paying charges, &c., to his eight children, to be equally divided among them. One of the children died before the widow, and the question was whether the legacy was vested. The court was unanimously of opinion that the legacy vested. The chief justice, Kirkpatrick, inclined to think the fund was to be considered as money, and that the rules applicable to ordinary legacies would well apply, as the land was to be converted into money by the executor for the benefit of the family. But even if it were held a legacy charged on land, he maintained it was vested, on the principle that the day of payment was merely postponed for the benefit of the estate and family. He says, "It is postponed in order to make a comfortable provision for the widow, and that too in lieu of dower. If this necessity had been

out of the way, the distribution would have been immediate. There was no consideration, no circumstance, no contingency immediately connected with this legatee, which was the ground of the postponement." And this is undoubtedly the true principle.

It is next to be ascertained, whether William Snyder was entitled to the whole of the legacy, it being given to him "and his heirs;" or whether his children were entitled to any part of it as legatees under the will.

The intention of the testator appears to me to be plain. He intended to give two thirds of the property to his own relations. He had two brothers living; another brother was deceased, leaving children. He says, "the two thirds shall be divided, share and share alike, between the heirs of Joseph Snyder, deceased, William Snyder and his heirs, and Peter Snyder and his heirs." He meant that the heirs of Joseph, who was dead, should represent their father and take one share among them, and that Peter and William should take the other two. The words "and his heirs," may have been adopted as words of perpetuity. It can scarcely be supposed that he meant to give the children of William and Peter an equal share with their fathers. Why should he do it? They were not related to him in equal degree, being merely nieces and nephews, whereas their fathers were brothers of the testator. If Joseph had been living, he would doubtless have given one portion to him and his heirs, as he did to William and Peter and their heirs, and the portion belonging to that side of the house would have been properly due to the three brothers.

And this agrees with what I consider to be the legal construction of the phrase. A legacy to A. and his heirs, is an absolute bequest to A., and the whole interest vests in him for his own use. This is the general principle, and I perceive nothing in this case to form an exception to it. It was held in a late case before sir John Leach, vice chancellor, that even a bequest to C. C. and the heirs of her body, was an absolute legacy to the legatee: *Crawford* v. *Trotter*, 4 *Mad.* 361. There is a class of cases in which it is decided that the word heirs may be construed to

mean children. They refer to wills in which it is very clearly shown that the testator so intended to be understood, and need not be canvassed here; for there is nothing in this will to induce the belief that the testator had any such intention.

This being, then, a vested legacy, and the right to it being in William Snyder, he had power to make an assignment; and the complainants are entitled to recover the property or interest assigned, unless the deed or instrument of assignment can be avoided, either in whole or in part.

An effort has been made to show that it was intended to be in the nature of a mortgage, and by parol evidence. This would be to contradict the written instrument, and cannot be done except under peculiar circumstances, which do not exist in this case.

There is certainly no fraud made out. There is no reason to suppose that any thing fraudulent or improper was intended on either side. The whole transaction appears to have been conducted with fairness by both parties. There is no direct fraud set up in defence, and there is none proved.

Inadequacy of consideration has been relied on to set aside or invalidate the agreement. The evidence offered in support of this was objected to. Such part of it as does not contradict the instrument, may be received. The deed of assignment does not express any definite consideration. It purports to have been made in consideration of a large sum of money due upon certain bonds, notes and obligations executed by said William Snyder to said Wintermute, and for money due upon the books of account of said Wintermute, and for the sum of one dollar. It is competent for the defendants to show what the actual consideration was, but not to show there was none whatever: *Brown* v. *Bell*, 20 *John. Chan. R.* 338; *Bullard* v. *Briggs*, 7 *Pick.* 537. In this last case, chief justice Parker held that more or less than is expressed in a deed may be proved by parol evidence as the consideration; and even a different consideration, if valuable, may be proved.

For the purpose of showing the actual consideration of the assignment, the defendants have produced a receipt, in the follow-

ing words, viz.: "Received June eleventh, eighteen hundred and twenty-three, of William Snyder, the sum of one hundred and sixty dollars and eighty-eight cents, by assignment to me of his share of his brother John Snyder's, deceased, estate; I say received by the said assignment as above stated, in full of all accounts, by me, PETER WINTERMUTE."

There is no doubt that the sum mentioned in the foregoing receipt is the true consideration, and that it then purchased an interest which is now worth more than two thousand dollars. There would seem, at first view, to be no equity in this; but to set the contract aside on that ground would work still greater injustice and mischief. Mere inadequacy of consideration is not, of itself, a distinct principle of relief. This has been repeatedly determined, and it was decided in this court in *Simmons* v. *Vandegrift*, *Saxton*, 55. "The common law, (says a learned judge,) knows no such principle. The consideration, more or less, supports the contract. Common sense knows no such principle. The value of a thing is what it will produce, and it admits of no precise standard. It must be, in its nature, fluctuating, and will depend on ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances which may induce him to part with it at a particular time. If courts of equity were to unravel all these transactions, they would throw every thing into confusion, and set afloat the contracts of mankind." Lord chief baron Eyre, in *Griffith* v. *Spratley*, 1 *Cox*, 388.

Still there may be such unconscionableness, such palpable and excessive inequality in a bargain, as to induce equitable interference. But in all such cases, the court goes on the ground of fraud, being satisfied that gross imposition or undue influence must have been practiced. If the inadequacy be such as to shock the conscience, it will amount to evidence of fraud, and will be so considered: *Coles* v. *Trecothick*, 9 *Vesey*, 246; *Copis* v. *Middleton*, 2 *Mad. R.* 409; *Peacock* v. *Evans*, 16 *Vesey*, 512; *Osgood* v. *Franklin*, 2 *John. Chan. R.* 1; 1 *Story's Eq. Ca.* 251, and the cases there cited. So, too, when there

are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud: 1 *Fonb. Eq.*, Bk. 1, ch. 2, sec. 9, note *a.*; 1 *Story's Eq.* 251.

I find in the present case no circumstances or ingredients which will warrant me in considering it one of constructive fraud. It is not sufficient that the one party was a debtor and the other a creditor. The debtor was not in distress, or even pressed. There was no anxiety on the part of the creditor to procure this assignment in satisfaction of his debt, but rather the reverse. And when it is remembered that some of this property was in the hands of the widow, who might live a number of years; that the amount to be divided was uncertain on that account; that difficulty might arise as to the construction of the will, and that it might be doubtful whether the assignor had really any vested interest or not, the inadequacy is not so great as it first appears to be. And when it is seen that the bargain was freely made, and in good faith, it cannot be disturbed on either of the grounds taken. "The difficulty of adopting any other rule, (says justice Story,) which would not in the common intercourse and business of human life be found productive of serious inconvenience and endless litigation, is conceded by civilians and publicists; and, for the most part, they seem silently to abandon cases of inadequacy in bargains, when there is no fraud, to the power of conscience and morals and religion:" 1 *Story's Eq.* 250, 251.

If the defendants are entitled to any relief whatever, it must be on the ground that the parties to the assignment acted under a mistake of the law. That this was the fact, I do not doubt. The amount of the consideration, and the face of the deed of assignment, both prove it. To the deed, and on the same paper, there is appended this writing:—"We the subscribers, the children and heirs of William Snyder, of the township of Hardwick, in the county of Sussex, for the consideration expressed in the foregoing deed, do hereby confirm, ratify and agree to the same; and grant and assign to the said Peter all our right, interest and demand, of, in and to the estate, money, goods and

chattels, in the foregoing deed granted and assigned, or meant or intended to be granted or assigned. Witness our hands and seals, the day and year above written." This supplemental writing, which is signed by only one of the children, (George Snyder,) shows the belief of the parties to have been, that Mr. Snyder, the father, who made the assignment, had only an equal share with his children in the legacy, and that his assignment would pass nothing more. Hence the effort was made to get the children to join.

There was also a mistake of the law as to the vesting of the legacy. They supposed at the time that if Mr. Snyder should die before the widow, his share would lapse, and of course Wintermute would get nothing, unless the children should also agree to the transfer. This is shown by the answer of some of the heirs, and goes far to throw light on the whole transaction. They allege that they heard Peter Wintermute, after the assignment, say, that he thought and believed if the widow should outlive Mr. Snyder, he would lose the share that had been assigned to him. And again, George Snyder, one of the defendants, says, that Wintermute told him at another time, that if the widow should outlive Mr. Snyder, that the share he had would be lost, and proposed that if he, George Snyder, and Henry Pippenger, (who had married one of William's children,) would give him their note of hand, payable for fifty dollars, he would give up the assignment to them; and the defendant replied, that for his part he would not do it, but that Pippenger might do it if he thought proper.

I think, then, it is clear from the deed itself, from the answer, the evidence, and the general circumstances, that the parties acted under this mistake. All, however, was done in good faith, and the question then presents itself, Can this court grant relief? The general rule is clearly against the exercise of such power. Agreements made and acts done under a mistake of law are generally held valid and obligatory, if not objectionable by reason of fraud, misrepresentation, or some other matter, which will afford a foundation for equitable interference. The rule is very

clearly and decidedly given by the supreme court of the United States, in *Hunt* v. *Rousmanière*, 1 *Peters*, 15, that a mistake of the law is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision.

One of the strongest authorities in opposition to this principle, is that of *Lansdowne* v. *Lansdowne*, *Mosely's R.* 364; in which the legal rights of two brothers to lands which had descended from a third one, was referred by them to a country schoolmaster; who, on consulting a book called the *Clerk's Remembrancer*, gave it in favor of the youngest brother, because lands could not ascend. Lord chancellor King ordered the conveyances to be given up, as being obtained by mistake and misrepresentation. There being misrepresentation as well as mistake, the authority would pass for little, but for the dictum which follows, in which the chancellor lays down the broad principle, that the maxim, *ignorantia juris non excusat*, was in regard to the public, that ignorance of the law cannot be pleaded in excuse of crimes, but it did not hold in civil cases. This broad doctrine is untenable, and has led to some confusion, but it ought not to unsettle the law. The decree itself was, that the agreement was obtained by a mistake and misrepresentation of the law. This case was examined, and its authority doubted, by the supreme court of the United States in the case above referred to.

In *Willan* v. *Willan*, 16 *Vesey*, 81, 82, the court relieved because the party did not understand the effect of the agreement; but the want of understanding was occasioned by ignorance and imbecility of mind, implying a want of capacity to understand, which makes a material difference. There is another class of cases which seem to militate, at first, against the rule, in which the court has relieved on the ground of surprise, mixed up with a mistake of law; but they do not, on examination, affect it. They go on the ground of breach of confidence, where the par-

ties stand in a confidential relation to each other, (*Lady Ormond* v. *Hutchinson*, 13 *Vesey*, 51,) or that the party had not sufficient time to act with caution, and was therefore surprised by an improvident act, (*Evans* v. *Llewellin*, 1 *Cox*, 340,) or that he had not the protection he ought to have had. Cases of infants dealing with guardians, and of sons with fathers, all proceed on this ground or a similar one, that if the party is in a situation in which he is not a free agent, and is not equal to protecting himself, this court will protect him: 1 *Cox*, 340, same case.

If in this case there was any mistake in the instrument itself, so that it did not contain in it what the parties had agreed on, a very different case would have been presented; for where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman either as to fact or law, does not fulfil that intention, or violates it, equity will correct the mistake so as to produce a conformity to the instrument: *Opin. of justice Washington*, in *Hunt* v. *Rousmaniere*, 1 *Peters' Sup. C. R.* 13—17. Here there was no such mistake. The instrument conveys just what the parties intended. Snyder intended to assign all his interest in the estate, and Wintermute intended to receive it; but as to what that interest was in law, they made a mistake.

In *Lyon* v. *Richmond*, 2 *John. Chan. R.* 60, the general principle, as above stated, is approved and adopted. "The courts (says chancellor Kent,) do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of the law. There is no other principle which is safe and practicable in the common intercourse of mankind."

I would not be understood as saying that no case can possibly occur in which the court would not interpose and relieve against a plain mistake, arising from ignorance of law. The supreme court of the United States did not go so far, nor has any other court. But surely the case in which an interference would be proper must be a very special one, and should show a very plain, clear mistake. And even then courts should be cautious; for

what one may suppose a plain point of law, another one may think equally plain, and yet construe it very differently.

From these premises it is clear that the court should not interfere to set aside this assignment. It is founded on a construction given to a will. The testator, and also the assignee, construed it one way, and acted accordingly, in perfect good faith. Their representatives think differently, and with their opinion the court coincides. But the case is one upon which men, and perhaps professional men, may honestly differ; and if the court should undertake to interfere in such and all similar cases, it would not want for employment; for in no instances are parties more liable to be deceived than in the construction of wills; upon no subject known to the law is there so much uncertainty.

I have come to this conclusion with some reluctance, especially as this part of the case was not spoken to by the counsel. If I had seen my way clear to afford relief in a case of so much hardship, I should have given it.

If the complainant had come here seeking the extraordinary aid of the court to enforce this assignment; if it had been an ordinary agreement or contract, the specific performance of which he sought to enforce through the power of this court, and which could not be enforced elsewhere, the court might well pause before it gave any assistance. It might turn the party over to a court of law, to seek a remedy in damages. But in the recovery of legacies this court has only a concurrent jurisdiction. The party's remedy is complete at law, and it would answer no useful purpose to turn him over to another tribunal and prolong litigation.

The complainants are entitled to a decree; and it must be referred to a master to take an account of what is actually due under the assignment, and how much it will be necessary to have in the hands of the executors for the maintenance of the slave mentioned in the will, and who is charged on the estate.

The complainants are not entitled to recover costs, there being reasonable grounds for defence. The executors of John Snyder,

deceased, are to be allowed their costs out of the fund recovered, and the other defendants to pay their own costs.

Decree accordingly.

GEORGE H. VERNON and Wife v. the EXECUTORS of JOHN MARSH, deceased.

Where a testator bequeathed to trustees a legacy for the benefit of an unmarried daughter, with directions, that if she should be desirous to have the money laid out in the purchase of real estate for her use and convenience, whether married or otherwise, the trustees should take the title for any property so purchased, in the name of such daughter only. *Held*, that the trustees were bound to lay out the money in the purchase of real estate, and to take the title in the name of the daughter, whenever she should desire it, although her husband (she having married) would thereby acquire an interest in the lands which might be charged with his debts.

The intention of the testator is to be taken from the will itself, and not from conversations which took place at the time it was prepared.

BILL by husband and wife, to compel the execution of a trust created in favor of the wife by the will of her father. The answer of the defendants, who are the executors of the will, and trustees therein named, admits the trust; but sets up, by way of defence to the bill, that they are willing and desirous to execute the trust, but that the cestui que trust herself was unwilling that the fund should be invested, as prayed in the bill; that the effect of such investment would be to contravene the intention of the testator, as declared to two of the trustees at the time of executing the will; and submitting for the decision of the court the construction to be given to the clause in the will creating the trust. The answer further states, that it had been agreed between the parties and their counsel that the bill should be filed in order that the true construction of the will might be settled, and the duty of the defendants touching the trust pointed out by the court.

The cause was heard upon bill and answer.

W. Pennington, for complainants.

J. J. Chetwood, for defendants.

THE CHANCELLOR. The case, as made by the pleadings, is with the defendants. They were constituted trustees by the will, and directed to invest the sum of three thousand dollars, given to Eliza Ann Marsh, the complainant, (then being unmarried,) at safe interest, and to collect and pay over the interest regularly to the said Eliza Ann, in her own proper person, taking her receipt alone therefor, and not otherwise; and they were further charged and directed, that if either of the daughters of the testator should be desirous to have her money, or part thereof, laid out in the purchase of real estate, for her use and convenience, whether married or otherwise, they should take the title for any property so purchased in the name of such daughter only.

The bill charges, that the complainants have agreed to purchase a house and lot in Newark, and that the trustees are unwilling that the title shall be made to the said Eliza Ann Vernon—she being the daughter of the testator, as named in the will, and insist on having the title made to themselves.

This is denied by the trustees. They say they have no desire to have the title in themselves, and are desirous to be relieved from the trust; but that the daughter herself is unwilling that the title should be taken in her name, if by so doing the property will be liable to be charged in any way with the debts of her husband. The trustees having been advised that such will be the result, have refused to pay the money and take a title in the name of Mrs. Vernon, the daughter. This unwillingness on the part of the daughter is explicitly and repeatedly alleged by the defendants in their answer, and the facts must be taken as true. The case is thereby relieved from difficulty; for it is evident from the will, that the trustees can act only on the desire of the wife, and not that of the husband. There is no such desire made out,

but the contrary, and there must be a decree for the defendants, with costs.

The object of the parties appears to have been, to obtain a legal construction of the will. The cause may be disposed of without giving such construction; but to prevent further litigation or difficulty, I am satisfied to say, that the trustees are bound by the will to lay out the money in the purchase of real estate, whenever the wife shall so desire it, bona fide, and understandingly; and that they are not to be governed by the consideration, that the husband will thereby acquire an interest in the lands, which may be charged with his debts. The directions of the will in this behalf are very plain. The intention of the testator is to be taken from the instrument, and not from conversations which took place at the time it was prepared; and laying those conversations aside, there can be no reasonable doubt as to the proper construction of the will, or the duty of the trustees under it.

Let the bill be dismissed.

Caroline E. English v. the Executors of Dr. James English, deceased.

To constitute an election by a widow to accept a legacy bequeathed to her in lieu of dower, there must be something more than a mere intention or determination to elect.

A declaration of such intention, even if made to those interested, will not of itself constitute an election at law.

There must be some decisive act of the party, with knowledge of her situation and rights, to determine the election, or an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons.

Signing a petition to the legislature for a sale of the real estate of the testator, to enable the executors to pay the legacies and execute the various trusts mentioned in the will, if the petition was never acted on, will not constitute a legal election.

[English v. Ex'rs of English.]

Nor will the fact that an answer to a bill in chancery was filed in her name, assenting to a decree for the sale of the real estate of the testator, to carry into effect the trusts of the will, (one of which was the payment of the annuity bequeathed to the widow in lieu of her dower,) and a decree made for such sale, constitute an election, if it appear that she was merely quiescent in the matter, and that the answer as filed was neither signed nor assented to by her.

BILL by a widow, against the executors of her husband, to establish her title to dower in the real estate of the testator. Answer by the executors, insisting that the complainant had elected to accept an annuity bequeathed to her by the testator in lieu of her dower. All the facts and circumstances necessary to a full understanding of the case, are stated in the opinion of the chancellor. The cause was heard upon bill, answer and proofs.

Nevius, for complainant.

Randolph, for defendants.

THE CHANCELLOR. Dr. James English, by his last will and testament, duly executed according to law, gave to his wife Caroline a house and lot situate in the city of New-Brunswick; so much of his household and kitchen furniture as she might choose to retain, a gold watch, her choice of the books in the library, and twelve hundred and fifty dollars in cash to be paid in one year after his decease. He further gave to his said wife the interest of six thousand dollars while she should remain his widow, to be invested in bond and mortgage under the direction of the orphans' court of the county of Monmouth; which bequest of the interest of the said six thousand dollars, was on condition that she received the same in lieu of her right of dower in his estate.

After some other specific devises and bequests, the testator gave all the residue of his property to certain religious and benevolent institutions in his will named, and directed his executors to apply to the orphans' court of the county of Monmouth for an order to

sell all his real estate in said county, at such time and on such conditions, as in their judgment would secure the best sale.

At a suitable time after the testator's death, an application was made to the orphans' court for an order to sell the real property, according to the directions of the will; the executors setting forth in the petition, that the sum of the personal estate left, after paying debts, legacies and expenses, was less than six thousand dollars, and not sufficient to enable them to pay to the widow her yearly interest without taking part of the principal, and therefore that a sale was necessary. The orphans' court declined acting in the matter for want of jurisdiction. A petition was then prepared to be presented to the legislature, praying a special act to authorise the sale. It was signed by the executors, Mrs. English the present complainant, and all the residuary legatees; and stated, among other things, the bequest of the annuity of six thousand dollars to the widow, and that the personal estate of the testator was insufficient to pay the debts, and the legacies to his widow and the other legatees named in the will. The petition not being prepared in time to be acted on by the legislature, was not presented.

Shortly after, the executors filed a bill in this court for relief, praying that the real estate might be directed to be sold, to carry into effect the trusts in the will. To this bill Caroline E. English was made a party defendant, together with the residuary legatees. A joint and several answer was filed, in which Mrs. English expressly admitted that the rents of the real estate, together with the residue of the personal estate, after payment of debts and expenses, &c., would not be sufficient to pay the specific legacy and interest bequeathed to her in the will of her husband, and that the payment of the annual interest bequeathed to her would soon absorb the whole residue of the personal estate. The suit was so proceeded in, that in October, eighteen hundred and thirty-five, a decree was made upon the bill and answer, by the consent of all parties interested, directing and authorising the executors to sell the whole of the real estate of the testator, and to apply the proceeds of such sale in a due

course of administration of the estate, and to carry into execution the trusts of the will. The property was sold under the decree. After the sale, and before the time for executing the conveyances, it became known that the widow intended to claim her dower in the land, and not accept of the conditional legacy of the interest of six thousand dollars, as given in the will. To obviate this difficulty, it was agreed that the widow should release her interest in the real estate to the purchasers, and that the executors should retain in their hands the one third part of the purchase money, and pay her yearly and every year during her natural life, the interest accruing on the same—in case it should be determined, by agreement or otherwise, that she had not legally waived her right to resort to her dower in said lands.

Under this agreement, a bill has been filed in this court, by the widow against the executors, in which, after alleging that she has made no election to receive the annuity in lieu of her dower, she prays a decree that she is entitled to dower in all the lands and real estate of her late husband, in addition to the devise of the house and lot in New-Brunswick, the sum of twelve hundred and fifty dollars, the furniture, books, watch, &c., upon her renouncing the bequest of the interest of said six thousand dollars.

The executors, in their answer, submit that the widow has made her election, and cannot now claim dower. They say that before the application was made to the orphans' court for an order of sale, she had been informally applied to, to make her election; and that she had expressly and unequivocally, and against the advice of one of the executors, declared her fixed and unalterable determination to take the annuity instead of her dower; that this determination was the basis of the application; that when the application failed, it was the mutual understanding of the parties that the executors should forthwith take such other measures as their counsel should recommend to effect a sale of the real estate, primarily and principally to pay the widow her said annuity; that consequently an application was prepared to be made to the legislature for a special act; that fail-

ing in this also, they prepared their bill of complaint in this court; that the proceedings and decree in that suit were based upon the fact that the widow had made her election to take the annuity instead of her dower, and that in order to raise the same it was necessary to effect a sale of the real estate; that she had full notice of all the proceedings, and either employed counsel or consented and directed that counsel be employed, and all proper and necessary steps taken to effect the sale of the said real estate; that entertaining no doubt that the widow had made her election, they proceeded to sell the property without consulting her, and sold it free from all incumbrances, which they certainly would not have done if she had not elected to take the annuity. The defendants further say, that in all their conversations with her relative to this subject, they understood her as making or having made her election, and conducted themselves accordingly; that she remained, after the death of the testator, in possession of the mansion house and homestead farm for several months; that she voluntarily gave up the same to be sold without making any claim or pretence of dower, or any portion of the rents or profits of any of the real estate of which her husband died seized, and they feel satisfied that her present course is the effect of a change of views with regard to the contingency on which her said annuity is dependent, or a belief that in consequence of the great advance of real estate since the testator's death, the dower may be more valuable than the annuity.

There is a single point presented by the pleadings, and by the agreement of the parties; Has the complainant elected to take the bequest in lieu of dower?

The case is not within the supplement to the act relative to dower, *Rev. L.* 677. That provides for cases where lands or real estate are given to a wife for life or otherwise, and without expressing whether the devise is intended to be in lieu of dower or not. In this case there is no question as to the intention of the testator. He gave to his wife real estate in New-Brunswick, but it is clearly expressed in the will that this devise was not intended to be in lieu of dower, or to interfere with any claim of

dower that she might make. The annuity was expressed to be in lieu of dower, and that alone. There is no ambiguity whatever upon the face of the will.

Nor can this case interfere with the construction given to the supplement, in *Stark* v. *Hunton*, *Saxt.* 216; for there, there was no expression of the testator, that the land devised was not intended to be in lieu of dower. The statute clearly applied, and the opinion of the court as then expressed is to be taken as referring to such cases only.

If, then, the widow has not elected to take the annuity, she is entitled to dower at common law; or, under the existing arrangement, to the interest of one third part of the purchase money, during life.

What acts of acceptance or acquiescence are sufficient to constitute an election, cannot be designated with sufficient precision to justify a general rule. Each case, as it occurs, must be governed by its own peculiar circumstances. The general questions are, whether the parties acting or acquiescing were cognizant of their rights; whether they intended to make an election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed; or whether these inquiries are precluded by lapse of time: *Dillon* v. *Parker*, 1 *Swans.* 382, in notis.

The present case is free from any difficulty growing out of the rights of third persons. If the claim for dower had not been preferred until titles had been made by the executors, or the purchase-money paid and possession rendered to the purchasers, it would have been difficult to restore the parties interested to their former situation, and the claim itself would have been canvassed with stricter scrutiny. It is also free from the objection growing out of a long continued acquiescence in a state of things inconsistent with the assertion of the claim. All is of recent date; and there is no obstacle in the way of ascertaining the rights of the different parties.

I think the pleadings and evidence pretty clearly show, that it was for a considerable time after the death of the testator, the

intention of the widow to take the annuity in lieu of dower. She openly expressed that determination at different times to one of the executors, and also to other persons. She appeared to feel that the will of her husband, so plain in its terms, and so liberal in its provisions in regard to herself, imposed on her a kind of moral obligation to comply with all its requirements, and carry out to the letter his benevolent intentions. But in a case of dower, there must be something more than a mere intention to elect. The right to dower is a legal right. Upon the death of the husband, the widow is seized at law of a freehold estate, and that estate cannot be divested by an intention or determination to take something else in lieu of it, no matter how often the intention may have been made known or communicated. Loose conversations with third persons to that effect, are of no account; and the making known of such determination, even to those who may be interested, will not of itself constitute an election in law. There must be some decisive act of the party, with knowledge of her situation and rights, to determine the election; or there must be an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons.

We have already remarked, that in this case no injury can accrue to third persons; and the question is to be settled upon the acts of the complainant. Of these, there are two entitled to consideration.

The first is, the joining in the proposed application to the legislature for a sale of the real estate, to enable the executors to carry out the intentions of the testator, in paying the legacies and executing the various trusts mentioned in the will. To the petition the name of the complainant is affixed in her own hand, and the fair presumption is she was acquainted with the contents and meaning of the paper. But this petition was never acted on; no application was ever made to the legislature for relief; no practical result grew out of it. The consent thus given for the sale of the property, was liable to be recalled at any time,

and of course it cannot be considered as decisive or binding so as to constitute a legal election.

The other act of the complainant is one of greater weight, and demands more consideration. After the application for a private law to authorise a sale was abandoned, the executors filed a bill in this court for a decree to authorise a sale of all the real estate of the testator not specifically devised. To this bill, the complainant in this suit, and all the residuary legatees, were made parties; and relief was sought on the ground that a sale was necessary to carry into effect the trusts of the will, one of which was the payment of the annuity to the complainant during her widowhood. An answer, purporting to be a joint and several answer on the part of the widow and the residuary legatees, was put in, merely echoing the charges of the bill, and joining in the request that a sale might speedily be made. And upon this, a decree was made, directing the executors to sell on giving the notice prescribed in the will. If this proceeding had been in the ordinary form; if the answer had been sworn to or even signed by the complainant, I should have considered it very difficult for me to overcome it. But there is good reason to believe that in all this matter she was merely quiescent; that the whole proceeding was conducted under the direction of the executors, founded on what they believed, and had reason to believe, was the fact, that all parties interested were desirous of a sale. The widow states that she gave no direction, employed no counsel, never saw or assented to the answer as prepared and filed; and when it is seen that the answer is neither signed nor sworn to by her, and that her statement is not denied by the defendants in this suit, it is fair to conclude that the statement is correct.

Under these circumstances, and seeing that she has interposed in season to prevent any injury to the rights of third persons, I feel unwilling to say that she is concluded by any act in reference to that suit. It is not clear to my mind, that any thing therein done or permitted in her name, ought to conclude her; and I cannot feel satisfied to divest her of a clear, certain and legal right, upon doubtful evidence.

The acts which determine an election, as recognised in the books, are generally of a very decided character. In *Ardesoife* v. *Bennet*, 2 *Dick.* 463, there was the receiving of a legacy for five years. In *Butrick* v. *Broadhurst*, 1 *Vesey*, 172; 3 *Bro. C. C.* 88, the widow entered on property and received the rents and profits for five years. And in *Earl of Northumberland* v. *Earl of Aylesford*, *Ambler*, 540, there was an entry into possession and exercising acts of ownership. All these were held sufficient to constitute an election. See also *Sanger* v. *Wood*, 3 *John. Chan. R.* 416. In this case the widow has never received any part of her annuity under the will.

This decision cannot affect the decree made in the former suit. That will be found on examination not to rest on the ground that a sale was necessary to raise the annuity for the widow, for that fact is not even set forth in the decree; but on the ground that it was expedient to sell the real estate at that time to carry into effect the general purposes of the will. But even if any difficulty could have arisen in consequence of the informality, it is cured by the release which has been executed on the part of the complainant.

If there are any other and prior claims of dower upon the property, as suggested in the answer, they are not to be affected by the allowance of the present claim.

I think that the widow is not, under all the circumstances, entitled to costs as against these defendants, and that they are entitled to receive their costs out of the assets of the estate.

Decree accordingly.

MARY DEARE, Executrix of WILLIAM P. DEARE, v. HANNAH CARR, Executrix and Devisee of ANN WHARTON, et al.

If a mortgage creditor becomes the purchaser of the mortgaged premises at sheriff's sale, under an execution issued upon a judgment rendered for the mortgage debt, the debt is extinguished to the amount of the purchase money.

So if the debt be due to husband and wife, or to joint creditors, and one purchases the mortgaged premises at sheriff's sale under an execution for the debt, upon the acceptance of the deed the amount bid operates as a payment *pro tanto*.

If a judgment creditor, having the judgment debt secured by a mortgage, becomes a purchaser of the equity of redemption subject to incumbrances intervening between his mortgage and judgment, through mistake or ignorance of the existence of his own mortgage, equity will not relieve.

The mistake or ignorance for which a contract will be relieved against in equity, must be mistake or ignorance of a material fact, essential to its character, and a material cause of its concoction.

The fact must also be such as the party could not, by reasonable diligence, have gotten knowledge of, when he was put upon inquiry.

When the fact is equally unknown to both parties, or when each has equal and adequate means of information, and both have acted in good faith, the court will not interfere.

Nevius, for complainant.

Kinsey, for defendants.

THE CHANCELLOR. On the twenty-fourth of November, eighteen hundred and seventeen, Andrew Rowan, late of the county of Middlesex, being seized of a certain lot of land of about eleven acres, with a tavern upon it, in the township of East-Windsor, in said county, gave a mortgage upon it to William P. Deare, to secure the payment of three hundred dollars.

On the sixth of March, eighteen hundred and nineteen, he gave to him another mortgage on the said tavern lot and another lot of about thirteen acres and an half, in the same township, to secure the payment of four hundred dollars.

On the first of April, eighteen hundred and twenty-three, he

executed to him a third mortgage on both lots, to secure the payment of three hundred dollars.

Besides these, there was a mortgage on the thirteen and an half acre lot, for one hundred and fifty dollars, dated the twenty-fourth of April, eighteen hundred and four, which was subsequently assigned to the said William P. Deare.

The complainant's bill is filed upon these four mortgages, to foreclose the equity of redemption, and for a sale of the premises.

On the ninth of November, eighteen hundred and thirty, Charles H. Wharton and Ann Wharton his wife, recovered a judgment against Andrew Rowan, in the supreme court, for nine hundred and fourteen dollars and thirty cents; and an execution issued on the judgment, by virtue of which Andrew Snowhill, sheriff of the county of Middlesex, levied on the two lots above mentioned, and on a wood lot containing about fifteen acres. These were subsequently sold at sheriff's sale. The wood lot brought six hundred dollars, and the tavern house and lot three hundred dollars. Both these were purchased by Alexander Hamilton, as agent for the plaintiffs in execution. The thirteen and an half acre lot was purchased by Samuel S. Deare, for five hundred dollars. Conveyances were subsequently made; one to Charles H. Wharton, for the two lots purchased in his behalf, and another to Samuel S. Deare, who has since conveyed to Elias Tice. After the purchase, Charles H. Wharton died, and his wife, as the survivor, became entitled, as it is claimed, to the judgment, or what might be due upon it; and she afterwards departed this life, having by will disposed of her property to Hannah Carr, and appointed her executrix and trustee.

Upon this state of the facts, no difficulty presents itself. Of the judgment and execution in favor of Dr. Wharton and wife, against Rowan, six hundred dollars was paid by the purchase of a wood lot, which was not covered by the complainant's mortgages. The purchase of the tavern lot extinguished three hundred dollars more. To this is to be added the five hundred dol-

lars, for which the thirteen and an half acre lot was sold to Samuel S. Deare. If any thing is still due on the judgment, it would seem that the mortgaged property is not bound for the payment, or at all events, that the mortgages of the complainant must be first satisfied.

The answer of Mrs. Carr, however, sets up, by way of defence, that all the proceedings of Dr. Wharton and wife, in obtaining the judgment at law, and in purchasing the two lots under the execution, originated in mistake, and ignorance of their own situation and rights; that they had in fact, at the time of the judgment and sale, a mortgage on the wood lot of fifteen acres, and also on the tavern house and lot of eleven acres, of a prior date to any of the complainant's mortgages, given to the said Charles H. Wharton and Ann his wife to secure the payment of a bond and sealed bill, which had been assigned to the said Ann as part of her portion of her father's estate. There can be no doubt of the truth of these allegations. The mortgage is produced, dated in April, eighteen hundred and ten, regularly acknowledged and registered—and was, of course, the first lien on the tavern house and lot. The mistake is satisfactorily accounted for by the fact that the mortgage, after being registered, was never taken from the clerk's office by Dr. Wharton. It remained there till the year eighteen hundred and thirty-four, and was probably forgotten. Its existence could not have been known to the counsel who conducted the suit at law, or a different course would have been pursued. Under these circumstances the defendant, Mrs. Carr, who is the only one of the defendants having any interest, insists that she ought not to be prejudiced by the mistake. So far as concerns the wood lot of fifteen acres, which was not covered by the complainant's mortgage, and which was purchased by Dr. Wharton for six hundred dollars, she is willing that the amount be credited on the judgment. As to the tavern lot, purchased for three hundred dollars by Dr. Wharton, no possession has ever been taken under the sale, and she submits, that as the purchase was made under a total misapprehension of right, she ought not to be compelled to credit the

three hundred dollars on the judgment, but that the lot should be resold, and the balance of the judgment, after deducting the six hundred dollars, be first satisfied out of the proceeds, and the residue be applied to pay the complainant's mortgage.

As the case now stands, Dr. Wharton is to be considered as a purchaser at sheriff's sale of the mortgaged property, or rather of the equity of redemption, under his own judgment. Upon general principles, the debt is extinguished to the amount of the purchase money. By the purchase, and the acceptance of a deed, the amount bid operates as a payment *pro tanto;* and it must be so considered in this case, unless the peculiar circumstances set up by this defendant shall operate to take it out of the general rule. The case is not materially varied, as I apprehend, by the fact that this was a joint debt to Mr. and Mrs. Wharton, and the mortgage a joint mortgage. The suit was on the bond, to recover the debt, and not on the mortgage, to get possession of the land, or to foreclose the equity of redemption. If they are to be considered in the light of joint creditors, having a joint judgment and execution, either one had a right to receive the debt or release it. A payment to one was a payment to both. The purchase of the tavern property for three hundred dollars, and the acceptance of the title, was equivalent to payment on the part of Rowan to Dr. Wharton, and Mrs. Wharton and her executor is precluded from denying it. If they are considered as husband and wife, and if this was the wife's property originally, the suing out of the execution on the judgment, according to some of the authorities, divested the right of the wife, and gave possession to the husband. If he had died after execution issued, his representatives, and not the wife, would have been entitled to the benefit of it: *Bond* v. *Simmons*, 3 *Atk.* 20; 1 *Roper's Husb. and Wife*, 209. But however this may be, it is clear that the husband had a right to receive the money. Even if it had been owing to the wife alone, in her own name, he would have had this right, and the receipt would have divested her title. So he could have assigned it: *Bash* v. *Dalway*, 3 *Atk.* 533; *Golds.* 160; *Moore*, 452; *Doswell* v.

Earle, 12 *Ves.* 473; 1 *Roper*, 216. Or he might have released and discharged it: 2 *Kent's Com.* 114.

According to the showing of the defendant, Mrs. Carr, this debt from Rowan was not due to Mrs. Wharton, *dum sola*. It was property that came to the wife after marriage. It became the property of the husband immediately, and the representative of the wife can have no just ground of complaint, that Dr. Wharton acted as he did in the premises, or that he and those claiming under him should now be held bound by his act.

The mortgage estate was, no doubt, a joint estate, so far as such an estate can vest in husband and wife. They were both seized of the entirety, and the survivor was entitled to the estate. It is now vested in the defendant, Mrs. Carr, for it has never been extinguished; but it is worth no more than the balance due on the execution, that being the balance of the debt the mortgage was intended to secure, and may be defeated by the payment of that balance.

The question, then, recurs; Can Dr. Wharton, or those claiming under him, be relieved against his mistake—or rather, his ignorance—and be placed in the same situation as before the purchase and acceptance of the deed?

Upon this point, I am brought to the conclusion that this court has no power to give aid to the defendant. There is no pretence of fraud or misrepresentation on the part of the vendor. Both parties were alike ignorant of the fact, that there was a mortgage in favor of Dr. Wharton and wife, prior to the judgment. The sale and purchase were in good faith, and the means of information were open to both. Under these circumstances, it appears to be settled that a court of equity will not interfere.

There are a great variety of cases in which relief will be afforded; so many, indeed, as to have given rise to the general rule, that an act done, or a contract made, under a mistake or ignorance of a material fact, is voidable and relievable in equity. The rule has a number of important qualifications or exceptions, and these are often as important as the rule itself. The fact as to which mistake or ignorance is alleged, must be a ma-

terial fact, essential to its character, and an efficient cause of its concoction: 1 *Evans Pothier on Oblig.* Pt. 1, ch. 1, art. 9, n. 17, 18; *Bingham* v. *Bingham*, 1 *Ves. sen.* 126. And even that is not in all cases sufficient. The fact must also be such as the party could not, by reasonable diligence, get knowledge of when he was put upon inquiry; for relief will not be afforded to culpable negligence: 1 *Fonb. Eq.* B. 1, ch. 3, s. 3; *Penny* v. *Martin*, 4 *John. Chan. R.* 566. And where the fact is equally unknown to both parties; or where each has equal and adequate means of information, and both have acted in good faith, the court will not interfere: 1 *Pow. on Cont.* 200; 1 *Fonb. Eq.* B. 1, ch. 2, s. 7, note (*v.*)

These material qualifications render it neceesary that the rule should be received with caution, and that cases supposed to be within it should be carefully examined.

Justice Story, in his late treatise on equity jurisprudence, remarks on this subject, that the general ground on which all these distinctions proceed is, that mistake or ignorance of facts in parties is a proper subject of relief, only when it constitutes a material ingredient in the contract of the parties, and disappoints their intentions by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria*: 1 *Story's Eq.* 163.

The same conclusion is drawn by Jeremy, in his treatise on *Equity Jurisdiction*, 366; and is recognized by Sugden, in his *Law of Vendors*, 9th edit. 255.

There are some cases which hold a contrary doctrine. The most important is one in the exchequer, *Hitchcock* v. *Giddings*, 4 *Price*, 135; in which chief baron Richards relieved from a contract on the ground of mistake, although there was no fraud

from knowledge, or concealment on the part of the vendor. Some broad doctrines are assumed in the opinion, which need confirmation. Lord Eldon subsequently expressed considerable doubt as to their soundness: *Sugd.* 255; and I think the authority of the case is much shaken, when it is seen that the chief baron puts himself, at least in one part of his opinion, on the ground that it was a case of fraud, though of entire ignorance on both sides.

In *Skillman and Wife* v. *Teeple*, *Saxt.* 232, the contract was set aside, not simply on the ground of mistake, but because the party was influenced by the advise of interested persons to make an arrangement which proved destructive of her claims. This was held sufficient to warrant an interference.

Without going further into the general question, I conclude that the defendant is not entitled to the relief she seeks—the case resting on ignorance alone, and there being no imputation of fraud.

There are other circumstances which satisfy me that this conclusion is right, and that the claim of the defendant should be dismissed. One is that the mortgage, of which Dr. Wharton was ignorant, was his own mortgage, given to himself and wife. It was in his own possession in law, and under his own control. And yet so great was his negligence, that the instrument was suffered to lie in the clerk's office till actually forgotten. A party who manifests so much inattention to his own concerns, cannot complain if a court of equity shall refuse him any assistance.

Another circumstance is, that the mortgage being registered, was legal notice of its existence to the whole world, and certainly to the mortgagee as well as any one else. If a stranger purchase property at sheriff's sale, subject to legal incumbrances on record, and makes no inquiry whatever about them, can he come, after paying the purchase money and taking a deed, and avoid the whole on the ground of ignorance? Such a prayer could not be entertained for a moment. On what better ground does the defendant stand? Has she as much equity?

The last I will advert to is, that the complainant in this cause

was no party to any of these transactions. She is only consequentially interested. The situation of advantage which she occupies in reference to the defendant, was brought about by the voluntary act of Dr. Wharton, and not through her interference. She is entitled to hold it unless a clear case of equity is made out against her—which has not been done.

Let there be a decree for a sale of the mortgaged premises, to pay, 1. The complainant's costs; 2. The balance of defendant's mortgage after deducting the purchase money, or amount of the first sale; 3. The complainant's debt; and 4. The costs of the defendant.

Decree accordingly.

Dr. James Vanmeter v. Thomas Jones, Executor of Thomas Jones, deceased.

There can be no doubt of the power of the court of chancery to look into the judgments of other courts, and to set them aside on the ground of fraud.

The decrees of ecclesiastical courts, and of this court, will be relieved against or avoided on the same ground.

The power and jurisdiction of this court over decrees in chancery, is not taken away or abridged by that clause of the statute of New-Jersey which enacts, that the sentence or decree of the orphans' court shall be conclusive upon all parties, except in certain specified cases, where the account may be opened by the court itself.*

An executor, who was also an agent or trustee of the testator in his life time, after the final settlement of his accounts as executor in the orphans' court, cannot be called on to account in equity as such trustee. There can be no separate accounting in the two different capacities.

A court of equity exercises the power of setting aside decrees of the orphans' court for fraud, not on the ground of concurrent jurisdiction, but by reason of an inherent authority, growing out of the principles and constitution of the court, and extending itself over judgments of courts of every description.

* See act of 13th June, 1820, sec. 32, *Rev. Laws*, 776.

[Vanmeter v. Ex'r of Jones.]

When and under what circumstances may fraud operate to impeach a decree? Will fraud in the incipient stage of a transaction be sufficient to overturn a decree subsequently obtained, when the party complaining of it was apprised of the facts on the trial, and had within his power the means of investigation; or is it to be confined to fraud in procuring the decree?—*Quære.*

In cases of family agreements and compromises, there must always be a mutual trust and confidence between the parties; and if there is any concealment of material facts, the compromise will be held invalid.

The inventory presented to the surrogate by an executor, should contain a specific enumeration of the goods, chattels and credits of the testator; a paper containing items, thus—"cash, bonds and notes,"—"household goods and kitchen furniture," is not, strictly speaking, an inventory, and may properly be rejected as such by the surrogate.

Jeffers and *Southard*, for complainant.

Field and *Wall*, for defendant.

THE CHANCELLOR. Thomas Jones, late of the county of Salem, died on the second of September, eighteen hundred and twenty-nine, at the age of seventy-nine years. In his will, which bears date on the fifth of July, eighteen hundred and twenty-three, he appointed his son, Thomas Jones, and his sons-in-law, Doct. James Vanmeter and David B. Smith, his executors; and after making sundry dispositions of real and personal estate, he bequeathed all the residue of his estate to his four children, viz.: Mary Yorke, Ruth Vanmeter the wife of the complainant, Thomas Jones, and Martha I. Smith the wife of David B. Smith, in equal shares. On the seventeenth of September, eighteen hundred and twenty-nine, the will was proved before the surrogate of Salem by Thomas Jones, one of the executors, the other two having previously renounced. On the twenty-first of the same month of September, James Vanmeter gave to the executor an instrument under his hand, in which he acknowledged to have received of the said executor three thousand dollars, and all the crop of wheat, rye and oats already raised by Andrew Remster for Thomas Jones, deceased, and all the crop

of corn on the Remster place, in full for the share of the personal estate bequeathed to his wife, Ruth Vanmeter, by the said last will of her father; and thereby exonerated him, the said executor, from the payment of any further sum, let the net balance be what it might; with a condition, that if on the settlement of the estate it should not yield a dividend equal to that amount, he the said Vanmeter should not be liable to refund.

In February, eighteen hundred and thirty, the executor exhibited his final account in the surrogate's office for allowance; by which it appeared that the net balance in his hands, to be divided as a residuum, according to the will, was thirteen thousand three hundred and forty-three dollars and thirty-nine cents.

In eighteen hundred and thirty-three, the complainant commenced a suit in the supreme court against the executor, in which he sought, as appears by the record, to recover for services rendered to the testator as physician for a number of years; and also to recover his full proportion or fourth part of the residuum of the estate. This suit was afterwards tried before a jury, and a verdict was rendered for the defendant.

The complainant then filed his bill in this court against the executor, in which he seeks, on the ground of misrepresentation and concealment, and of various acts of fraud, to charge the defendant, as trustee and executor, with divers large sums of money, in which he is equitably indebted to the estate, and for which he ought as executor to have accounted. He insists that the receipt, and also the settlement and decree in the orphans' court, were obtained by fraud; and he asks "that a general account may be taken between the said Thomas Jones, as well as agent and trustee of the said testator as executor, and that he be decreed to pay to the complainant the one fourth part of what may be found due on taking the said account."

The complainant's charges of fraud and misconduct on the part of the defendant, may be embraced within the following heads:—

1. That with the view of getting all the estate in his own hands, and the better to conceal his own indebtedness and mis-

application of his father's funds, the defendant fraudulently induced James Vanmeter and David B. Smith, who were named with him as executors in the will, to renounce the office.

2. That he then, by concealment and misrepresentation, obtained from the complainant a receipt and discharge for all that part of the personal estate which was given to his wife in the will.

3. That the appraisement was illegally and fraudulently made.

4. That the note mentioned in the will, the principal of which was to be accounted for by the executor, was not included in the appraisement.

5. That the executor has not accounted for the moneys received by him as agent for his father, while he transacted his business for three years before his death.

6. That the decree of the orphans' court, as containing and declaring the balance in the hands of the executor, was procured by fraud, and should be set aside.

There can be no doubt of the power of this court to look into the judgments of other courts, and to set them aside on the ground of fraud. The decrees of ecclesiastical courts have often been relieved against on this ground: *Vanbrough* v. *Cock and al.*, 1 *Ch. Ca.* 201; *Bissell and al.* v. *Axtell and al.*, 2 *Vern.* 47. And so, in like manner, have awards: *Ld. Lonsdale* v. *Littledale*, 2 *Vesey*, 451; and verdicts: *Williams* v. *Lee*, 3 *Atk.* 223; *Bateman* v. *Willoe*, 1 *Scho. and Lef.* 201; and judgments at law: *Barnesley* v. *Powell*, 1 *Ves. sen.* 119; *Gainesborough* v. *Gifford*, 2 *P. Wms.* 424; *Humphreys* v. *Humphreys*, 3 *P. Wms.* 394. And even decrees of this court may be avoided for the same cause: *Loyd* v. *Mansell*, 2 *P. Wms.* 73; *Galley* v. *Baker*, *Ca. Temp. Talb.* 201; *Bradish* v. *Gee*, *Amb.* 229.

And with regard to decrees of the orphans' court, on the final settlement of accounts, although the legislature has declared that the sentences or decrees of those courts shall be conclusive upon all parties, and exonerate and discharge them from the claims of

creditors, except in certain specified cases, when the accounts may be opened by the courts themselves; yet it has been decided here, on demurrer, that the power and jurisdiction of this court is not taken away or abridged by that enactment; and that the decrees of the orphans' courts may be looked into and relieved against on the ground of fraud: *Burtis and al.* v. *Adm'rs of Barzillai Hopkins*, January term, 1823. This is no longer an open question.

The complainant in this case is concluded by the decree, unless it can be avoided on the ground of fraud. An attempt has been made to charge him in the separate capacity of agent or trustee—upon the principle that during the latter years of the testator's life, when he was infirm, and, as is alleged, incapable of transacting business, the defendant had the management of his pecuniary affairs; and that as he was not then executor, he may be called to account as trustee. I apprehend there is no foundation for this distinction. If there was any indebtedness or liability to the estate on the part of the defendant, it was his duty to account for it as executor. If he had any funds in his hands, they constituted so much of the assets of the estate, and were to be brought in to be disposed of in a due course of administration. They could be reached by creditors or legatees only through that medium. There can be no separate accounting in the two different capacities. And there is, therefore, nothing in the case to take it out of the general rule.

In looking at this matter of fraud, it may be useful to inquire when, and under what circumstances, fraud may operate so as to impeach a decree, or a judgment—for both stand upon the same foot. Will fraud or misrepresentation in the incipient stage of a transaction, be sufficient to overturn a verdict or judgment subsequently obtained, when the party complaining of it was apprised of the facts on the trial, and had within his power the means of investigation, and either omitted to make use of them or used them ineffectually? Or is it to be confined, in the language of some of the books, to fraud in procuring and obtaining the decree?

The present case will illustrate my meaning. The defendant is charged with procuring the renunciation of James Vanmeter and David B. Smith, who were named as co-executors, by fraudulent means and for fraudulent purposes. Admitting the fact to be so, and that the party might have avoided the act of renunciation, but did not, is it a ground for setting aside the final decree upon the accounts of the executor who thus procured the renunciations? Suppose the release or discharge to have been procured by misrepresentation or concealment, so as to render it invalid in equity, will that affect the decree? Will the fact that the note was not included in the appraisement be sufficient? The party, it will be seen, after the occurrence of all these circumstances, has permitted a final decree to be made by a proper tribunal, in which he had a full opportunity of being heard by witnesses, and of sifting the conscience of the executor by an open, personal examination, if he thought fit to do so.

In the case of *Burtis* v. *Hopkins*, already alluded to, it was charged by the creditors, that one of their number agreed to attend and file exceptions to the account of the administrators in behalf of all, and was appointed agent to do so; and that the administrators, being cognisant of the fact, paid him his claim, and gave him a premium not to appear. This was an instance of direct fraud in obtaining their settlement and decree, and was certainly within the power of the court. So in the present case, that part of the bill which charges the defendant with preventing a full investigation of the case in the orphans' court, by the compromise effected with David B. Smith, may be within the admitted power of the court. But as to some of the matters complained of, I have strong doubts of the propriety of any interference at this time by this court.

It is true the complainant here was not actually a party to the proceedings in the orphans' court; but why did he not come in and make himself a party? The proceedings were, in a certain sense, against him and all other parties interested. They were to be final. The account was before him. It was open to his investigation; and, upon ordinary principles, he should be con-

cluded. He says, it is true, in general terms, that the investigation, so far as it proceeded, in the orphans' court, fully disclosed to him the fraud which had been practised on him in obtaining the receipt for the said legacy; but he does not disclose what were the facts and circumstances which then came to his knowledge, so as to enable the court to judge whether, with ordinary diligence, he might not have discovered them before, and whether he might not have had the full advantage of them all, if he had thought proper to file exceptions to the account.

And, then, with regard to the judgment of the supreme court; it is final between the parties, so far as the matters involved in this controversy were directly at issue. It is plain from the record, that the complainant sought to recover in that suit the amount of his distributive share, according to the account as settled in the orphans' court. It is distinctly declared for in two of the counts. This could be done only on the assumption that the release was void, and that he was not concluded by it. That issue was found with the defendant. It established the release. This suit in the supreme court was brought after the investigation in the orphans' court, at which time the complainant alleges he discovered the imposition that had been practised on him. With a full knowledge, then, of all the facts, he brought a suit, founded in part on the decree of the orphans' court. He sought to recover in the face of his receipt, and failed.

He comes now into this court to have that matter re-investigated. It is not shown that the subject was incapable of being discussed there, or that the court of law had not full jurisdiction. It is not alleged that the verdict was obtained by fraud, or that the defendant had any unconscientious advantage at law, which equity will either put out of the way, or restrain him from using. So far, then, as this part of the case is concerned, is it not a request for a new trial? And is this court at liberty to grant a new trial under such circumstances?

It does not alter the case, according to my view of it, that in matters of executors' accounts and settlements, this court has a concurrent jurisdiction with the orphans' court. It exercises the

power of setting aside decrees for fraud, not on the ground of concurrent jurisdiction, but by reason of an ancient, or rather an inherent authority growing out of the very principles and constitution of the court, and extending itself over the judgments of courts of every description.

From these premises, I am strongly inclined to think the complainant does not stand in a situation which entitles him to have all the matters of which he complains investigated anew, upon the allegation that there is fraud in them or in some of them, and thus avoid the judgment at law and also the solemn decree of the orphans' court. But as the defendant has not in his answer prayed any benefit from the judgment of the supreme court, or distinctly set it up as a bar to any part of the inquiry; and as there are more charges which, if substantiated, may be sufficient to impeach the decree of the orphans' court, and these are connected with others of a more doubtful character; and also as the matter has been argued and fully canvassed on the merits on both sides, I prefer to look into the facts of the case, and see whether any of the charges of fraud are sustained by the evidence, and if so, whether they are of such a character as should in equity impeach the decree.

The first charge of fraud relates to the procurement of the renunciation of the office of executor on the part of David B. Smith and the complainant.

On this subject the bill charges, that the executor, having previously determined to retain possession of most of the personal estate of the testator, did not, on occasion of the reading of the will, produce any account or statement of the property or money or income of the testator; but on being asked some questions in relation thereto, the morning after, he pretended to take offence, and immediately, and without any cause or provocation being given, sought to quarrel with the complainant, declared that he would not act with him as executor, and demanded that he should renounce the office. He refused to have the will inspected, or to offer it for probate, until complainant and Smith should renounce; represented it as the dying request of his father that

he should settle the estate, and offered to do it without commissions. Finding that he was determined upon an open family rupture, complainant was compelled by his hostility to renounce the office of executor. He then applied to David B. Smith, and when he found his offers of settling the property were likely to fail, he threatened to enter up judgment against Smith on his bonds, and ruin him and destroy the peace of his family; and under these threats and circumstances, Smith also renounced; and Mary Yorke having also renounced, the defendant was now sole executor.

The defendant, in his answer, admits that he declined acting with the complainant as an executor, but denies that he pretended to take offence or sought a quarrel. He says, that from the moment the will was read, the complainant manifested the most deadly hostility against him. He declared that he would make this defendant exhibit an account of all the moneys received and expended by him during the last three years of his father's life, and of all the meals he had eaten in his father's house during that time. He refused to execute a quit-claim to Lewis L. Yorke, according to the request of the testator, for twelve acres of land which were not included in the will. He refused to let Mary Yorke, the widow, retain the household furniture and property at the appraisement, but insisted they should be sold and the most made of them. He also uttered offensive charges and made insinuations against the defendant, which he was obliged, out of self-respect, indignantly to repel. These, the defendant says, were the causes of the rupture, and the reasons which induced him to decline acting with the complainant in the settlement of the estate. The defendant denies, also, that he made use of any threats to induce David B. Smith to renounce, such as the complainant has set forth.

The charge, so far as relates to the means used to induce a renunciation on the part of Dr. Vanmeter, is rather vague in its character, and with perhaps a single exception is sufficiently answered. The exception relates to the refusal to have the will of the testator inspected. To this there is no answer. But I can-

not perceive how that was to operate as an inducement for the complainant to give up the executorship. It is evident from the bill and answer, that a family difficulty commenced about the time of reading the will, or soon after. Which party was to blame, it is not needful to inquire; but in the fact of its existence as between Dr. Vanmeter and the executor at this early period, may be found a sufficient motive for the determination of Mr. Jones not to serve in the office of executor in connection with his brother-in-law, the complainant, without imputing to him the desire of getting the whole property in his hands for the sake of taking an undue advantage. So far as the charge is denied by the answer, it must pass for nothing; for I do not perceive any evidence to support it.

That part of it which imputes to the defendant the use of unmanly threats towards David B. Smith, to compel him also to relinquish, is very directly denied by the answer, and this is entirely corroborated by the testimony of Smith himself, who was examined as a witness. He says that Jones requested him to renounce, saying that he, Jones, could settle the estate better than any one else, and he had rather do it himself; but the witness expressly says, he does not know that Jones ever made use of any persuasion or argument to induce him to renounce. The threat about the judgment bonds was, according to the testimony of Smith, two or three weeks afterwards, and had relation to different matters altogether.

It is very evident that Jones was anxious that his brothers-in-law should not be associated with him in the settlement of the estate. He admits that he was desirous of settling it alone, alleging that it was his father's wish that he should do so; but he denies that in this desire he was influenced by any improper motive. I do not perceive that there is any thing in this part of the case to charge him with impropriety of motive or conduct.

If Jones was bent on defrauding the family, of what importance was it that he should have the sole management of the estate; or how were the rights of Vanmeter and Smith impaired by the renunciation? The obligation to account on the one

side, and the right and power to compel an account on the other, still remained. There is no pretence that any of the property has been concealed. If Jones was indebted to the estate for large sums advanced, the debt was cancelled by the will, with the exception of the note, which was to be paid. That this note was no longer in existence, was not concealed from the parties interested. It was communicated on the first occasion that offered, to wit, the reading of the will, and before any thing was said about renunciation. If he had taken to his own use moneys received for his father when in a state of imbecility, for which he refused to account, their remedies against him were not taken away. They knew he had acted for his father, and the whole subject matter was open for investigation. They stood on as good, perhaps better ground as legatees than as co-executors; for they have been enabled, in the various stages of this controversy, to make use of each other's testimony, as occasion might require—a privilege which as co-executors they might not have enjoyed.

If the intention of the defendant was to commit a fraud, it appears to me he took a singular course to accomplish his object. He began by frankly communicating just what he ought to have concealed; and he used menaces and threats, when mildness would have answered a much better purpose. If he desired to get the whole assets in his own hands, that he might the more easily withhold that part which was supposed to be due from himself, why did he disclose the fact that the note which he was required by the will to pay, had been given up and cancelled, and would not be accounted for as part of the estate? Why did he not conceal that important fact until he had accomplished his object and found himself safely on the vantage ground? Why did he unnecessarily and without cause, according to the complainant's showing, excite angry feelings, the natural tendencies of which were to induce opposition to his wishes? Upon the ground assumed by the complainant, the whole matter is inexplicable.

Dismissing this part of the case as untenable, I proceed to

consider briefly the second charge, which relates to the fraudulent procurement of the receipt given by the complainant for his wife's share of the personal estate, under the will.

In relation to this, the bill states, in substance, that after the will was proved the defendant refused to give any account of the estate, or have any appraisement of the personal property, constantly offering to settle with the complainant, declaring that his wife's share would not be quite three thousand dollars; that he made many excuses to his sister, Mrs. Vanmeter, for his rude and improper conduct towards her husband; and stated that although her share would not amount to three thousand dollars, yet he would make up that sum and would pay immediately the legacy of five hundred dollars, bequeathed to Thomas J. Vanmeter, her son. That his strong representations as to the property of the testator, and his solemn declarations of his perfect knowledge therein; his asseverations that it would not amount to three thousand dollars apiece, and his professed repentance for former misconduct, induced the complainant and his wife, for the sake of avoiding a family dispute, to agree to accept the three thousand dollars in full for her share of the estate; and upon receiving an assignment of bonds, and thirty dollars and fifty-nine cents in money, the complainant signed a receipt for the said share.

To this the defendant answers, that he has no recollection that at the time of reading the will any thing was said about the probable amount of the estate; but a day or two after, being in company with complainant and David B. Smith, the latter inquired what the probable amount of the personal estate would be. The defendant answered, he did not know, he had made no estimate. Complainant then observed, that the testator had told him it would amount to about three thousand dollars for each of the residuary legatees; adding, that if any part of Dr. Rowan's bond was lost, it would probably fall short of that sum. At the next interview, the defendant informed Vanmeter and Smith, he had no doubt the net amount of the personal estate would exceed three thousand dollars apiece if no losses were sustained. After

this, no communication took place directly on the subject between Dr. Vanmeter and himself; but a proposition was made by the complainant to him, through his sister, Mrs. Yorke, that if he would agree to pay him down the sum of three thousand dollars, and would also pay him his son's legacy of five hundred dollars, he would be satisfied, and would release the defendant from any further claim he might have against him as executor. To this proposition the defendant agreed, and requested his sister to inform her husband. The next day he visited his sister at her written request. She then insisted, that in addition to the three thousand dollars he had agreed to pay the complainant, he should also give him the crop of wheat, corn and oats on the Remster place, belonging to the estate; representing that the complainant had rendered many services to the testator without charge, and if the grain was given up he would be perfectly satisfied. To gratify his sister, the defendant agreed to this also; upon which a long conversation of a friendly character took place between them, in which he told her, among other things, that some things he had said to her husband were said in a moment of anger; but he denies that he expressed any contrition for any thing he had done, or that he made any representations with a view of deceiving her as to the probable value of her share of the estate. He made the same representations to her that he had made to the complainant, as far as he recollects, and to the other legatees. He did not profess to have made any examination for the purpose of ascertaining precisely the amount of the estate, but expressed the opinion he honestly entertained, and in which he might very easily have been mistaken. He told Mrs. Vanmeter that the dividends would certainly amount to three thousand dollars, and would not at all events fall far short of that sum. He denies that he ever refused to have an appraisement, and has no recollection of ever having been requested to have the property appraised, until after the will was proved.

Such is the charge, and such the answer. The gravamen of the complaint is, that the defendant, having knowledge of the amount of the property, refused to make it known and exhibit

an inventory; and, representing that the shares would not be three thousand dollars each, constantly offered to settle with the complainant; and represented to his sister, Mrs. Vanmeter, that although her share would not amount to three thousand dollars, yet he would make up that sum, and would pay the legacy at once, and also her son's legacy; and that it was agreed to for the sake of avoiding a family dispute.

That there was no exhibit made of the amount of the personal property, is certainly true; and it is a little singular that the parties should have made a settlement without it. But that the defendant ever refused to make one, or exhibit an inventory, he expressly denies, and says he was not asked to have the property appraised till after the probate of the will. There is no evidence to dispute this. What testimony there is on the subject goes rather to corroborate the answer. David B. Smith says, he thought it hard that the defendant did not furnish a statement of the property; he thought it his duty to do it; but he says the executor never refused to do it because he never asked him for one, and he does not know that Dr. Vanmeter ever did.

It is alleged also in this charge, that the defendant was constantly offering to settle with the complainant. This is also denied in the answer, and there is nothing to support the allegation so far as regards the offers to settle. The offers, it would seem, came from the other side. The first one, according to the answer, was made by the complainant through the medium of Mrs. Yorke, and was accepted on the part of the executor. This is confirmed by the evidence of Mrs. Yorke; and I do not see any thing in the whole case to induce the conclusion that the executor, under the circumstances in which he was placed, manifested any undue anxiety to make a settlement with Dr. Vanmeter, or that he was desirous of doing it before the Doctor should find out the amount of the estate.

It is alleged, too, that in those constant efforts to settle, he represented that the shares would not be quite three thousand dollars each. In relation to this, it is charged in the bill, that when the will was read, the defendant stated very explicitly that

there would not be three thousand dollars coming to each one under the residuary clause. The defendant says, he has no recollection of having so said; but it is fully proved by the testimony of David B. Smith, and must be taken as true. At the time this declaration was made, there were no papers exhibited, no examination made by any one; and it is very evident, if other parts of the defendant's answer responsive to the bill are to be believed, that the settlement was not made on the faith of that statement. He says, that a day or two after the will was proved, he stated to Smith, in the presence of the complainant, that he had made no estimate of the estate; and that at a subsequent interview with Smith and Vanmeter, he told them he had no doubt the net amount of the personal estate would exceed three thousand dollars apiece if no losses were sustained. These statements are not denied by Smith; on the contrary, Smith says, he remembers perfectly well that the defendant told him the estate would pay to each one more than three thousand dollars. His first impression was, that this was after the settlement, which would appear to give countenance to the idea that the defendant had knowingly misrepresented for the purpose of effecting a favorable settlement; but on further examination, he said it appeared to him the conversation was near about the time of the renunciation of the executorship, which was some time before the settlement with Vanmeter. If Jones had contemplated to practice a deception on Dr. Vanmeter with respect to the amount of the estate, he would scarcely have made such a communication to Mr. Smith at that time, he being also concerned in the amount of the estate, and on terms of intimacy with the complainant. In addition to this, the defendant says, he stated to Mrs. Vanmeter, before the settlement took place, (and when she was acting as a kind of agent for her husband,) that if no losses occurred the property would certainly amount to three thousand dollars a share, and would not at all events fall far short of that sum.

Take, then, the answer and the evidence together, and it is not proved that the defendant was constantly offering to settle,

declaring that Mrs. Vanmeter's share of the property would not amount to three thousand dollars. They show, I think satisfactorily, that there was no intention on the part of the defendant to deceive or circumvent the complainant, and that he was not deceived. The different statements made by the defendant as to the amount of the property, show that they were founded on mere estimates. The complainant chose to be satisfied with these, without procuring the information which it was in his power to obtain if he chose; and I do not perceive what complaint he can now make even in equity.

In cases of family agreements and compromises, there must always be a mutual trust and confidence between the parties; and if there is any concealment of material facts, the compromise will be held invalid: *Gordon* v. *Gordon*, 3 *Swanst. Rep.* 399—463; 2 *B. and Beat. Rep.* 171. I have examined this evidence attentively to ascertain whether there was any such concealment of material facts, and my impression is clear that there was not. The defendant very frankly communicated to the parties interested, in the outset, that the note mentioned in the will, for which he was to account, had subsequently been given up to him by his father, and of course could form no part of the assets. This was a material fact, and the complainant had a right to know it, and the concealment of it might have been sufficient to avoid the release. But I am unwilling to carry the principle so far as to say, that because the defendant did not tell Dr. Vanmeter that he had not included in the estimate what is now claimed to be due to the estate from him as agent for his father, upon the ground that the testator was entirely incapacitated for business, that this was the concealment of an important fact. The defendant denies any such indebtedness or liability on his part, or incapacity on the part of the testator. There was no such claim made at the time—nothing was said on the subject—and I cannot conceive that the defendant was under any equitable obligation to speak of a claim which he did not know of, and therefore could not suppose formed any part of what was to be settled. This would be to convert

a wholesome rule into a trap for the innocent and unsuspecting.

I have already stated that the settlement, at the time and under the circumstances, was a little singular. A single fact stated in the answer of the defendant, may aid in furnishing an explanation. A day or two after the will was read, Smith, Vanmeter and the defendant were together, and Smith inquired what the probable amount of the personal estate would be: to which defendant replied, he did not know; he had made no estimate. The complainant then said, that the testator had told him it would amount to about three thousand dollars for each; adding, that if any part of Dr. Rowan's bond was lost, it would probably fall short of that amount. It would seem from this that the complainant had knowledge from another source than the defendant, what would be the probable amount of his share; and I think there can be little doubt, that in making the settlement, he acted on that knowledge, as well as what he gathered from the opinion of the executor.

Thus informed, he, or his wife for him, asked for other property in addition, to the amount of eighty-five or ninety dollars, which was given. He received the whole in a very short time after the testator's death, together with the legacy to his son, without trouble, loss or deduction for commissions—gave a release, containing an indemnity against all loss the estate might sustain, and declared himself perfectly satisfied.

I see no ground to disturb the decree of the orphans' court on account of any fraud in this receipt. The charge is not supported.

3. It is insisted, however, in the third place, that the appraisement was illegally and fraudulently made.

The bill states, that after the receipt was given by the complainant, the executor called in two respectable citizens to make an appraisement of the personal property; told them he had settled with all the heirs and legatees, and there were no debts, and that the appraisement being a mere matter of form, it would not be necessary to examine any of the obligations, notes, mortgages,

books, &c.; and the appraisers, confiding in his statements, did not examine any of them, but took the same from a memorandum prepared by the executor, or some one under his direction.

The defendant, in his answer, denies that he represented to the appraisers that he had settled, or was about settling, with all the heirs and legatees, and that as there were no debts, the appraisement was a mere matter of form. On the contrary, he says the bonds, notes, &c. were all produced, and all the personal property carefully examined by the appraisers. He admits that he made a memorandum of the bonds, securities and principal articles of personal property, as a guide to the appraisers, but the articles themselves were afterwards produced and examined. He asserts that the appraisement was fairly made, and includes every article of personal property known to belong to the testator.

There is some discrepancy in the testimony of the appraisers upon one point. One of them states that the bonds and notes were produced, but were not particularly examined; that they were enveloped in a paper, which the witness unwrapped; he thinks he opened one or two, and saw the endorsement of several. The other appraiser insists that there were no bonds or notes produced, at least he saw none, and that the appraisement was made from a list furnished by Mr. Yorke. There is doubtless some mistake, some misrecollection on the subject, and there is no occasion to impeach the testimony of either of these respectable witnesses. The one is an affirmative, the other a negative witness; and the law directs the course to be pursued, without at all calling in question the veracity of either. Besides this, the testimony of Thomas Jones Yorke, who was present, and aided in taking the inventory, is satisfactory to show that the bonds were all produced. If they were not separately examined, it was not the fault of the executor; for Mr. Sinnickson, one of the appraisers, says, it was at his own suggestion, and not that of the executor, that the list was taken by them instead of the bonds. In all other matters the appraisers agree substantially in their testimony, and support the answer. Both agree in stating that

there was a disposition manifested to show all the property and have it appraised. There was no effort to conceal any thing. They went from the garret to the cellar, and appraised every thing that was pointed out to them by Mr. Yorke as the property of the testator. There were some few fancy articles, said to belong to Mary Jones Smith, which were presents from Lewis Yorke, not appraised, and also some goods claimed by Mrs. Yorke.

It is evident that the inventory as taken, was taken in good faith; and the allegation of the complainant, that the defendant represented to the appraisers that it was a mere matter of form, as the legatees had all been settled with, and all the debts were paid, is not only denied by the answer, but finds no support in the evidence. One of the appraisers says he has no recollection of any such conversation, or any thing like it; and the other says nothing in relation to it.

There is, then, no fraud, or even irregularity on the part of the executor, connected with the taking of the inventory. If the appraisers did not perform their duty in making a separate examination of the bonds, the blame cannot rest on the executor. They were presented and shown. If any mistake has arisen from this mode of doing business, it should be pointed out. There is clearly no fraud.

While on this subject, I must be permitted to say, that the form in which the inventory is made out and presented to the surrogate, is exceptionable. It is not, strictly speaking, an inventory, but rather an abstract or compendium of one. One item is, "Cash, bonds, notes, &c. $13,993 06." Another, "Household goods and kitchen furniture, $298 00." A third, "Horses, cows and swine, $268 00." This is a common mode, I believe, in some parts of the state. A particular list is made out in the first place, as the appraisement proceeds; but before it is sent to the office it is abbreviated so as simply to show gross amounts. This is done, as in the present case, without any intention of doing wrong; but the practice is not to be commended. Surrogates would do right to reject such papers as invento-

ties. They often work injury to creditors and legatees, and sometimes involve executors and administrators in serious difficulty. In fact, it is almost impossible to settle any estate with intelligence and accuracy without other aids than they furnish.

4. Another charge is, that the note of the executor, mentioned in the will, the principal of which was to be accounted for by him, was not included in the appraisement, and has not been accounted for in the settlement.

The complainant charges the amount of this note to have been from six thousand to thirteen thousand dollars.

The answer states, that no such note was in existence at the time of the testator's death. It was given up and cancelled by the testator more than two years before his death, in the presence of his daughter, Mary Yorke, voluntarily, with a perfect knowledge of what he was doing, and in consideration of the services rendered to him by the defendant after the making of his will. The amount of the note was one thousand dollars.

It could not have been a matter of surprise to the complainant that this note was not put in the inventory. He knew it formed no part of the estate when he made the settlement, and took the three thousand dollars as his wife's share. If he did not know of the cancellation of this note before the death of the testator, he knew it very soon after; for, according to his own showing, it was communicated by the executor without any reserve, on the day the will was read. There was, then, no surprise on the complainant. He was under no misapprehension on the subject, and if he was not perfectly satisfied with what had been done, it is not easy, upon the ordinary principles which govern men in the transaction of business, to account for his making a voluntary settlement, at so early a period, especially if he believed, as he now charges, that the amount of the note was from six thousand to thirteen thousand dollars.

It may be said, however, that he did not then know that the note was given up to be cancelled at a time when the decedent was incompetent to transact business, and when he might easily

have been imposed on, and that it was given up without consideration.

If the complainant knew that such a note was once in existence, and believed the amount was any thing like what is now represented, it is strange that he did not, before he made the settlement, make a single inquiry as to the circumstances of the transaction;—when the note was given up, and why? and who was present? Such inquiries would have been natural and proper. It does not appear that any such were made.

But passing this by, it becomes proper to inquire whether the testator, at the time, was competent to the transaction of business?

The bill charges, that he died at the age of seventy-nine years, and that for several years before his death he was in a feeble state of bodily health, and his mind was affected so as to render him incapable of the management of his affairs; that his disability both of body and mind gradually increased. He had had three attacks of apoplexy and palsy; his right side was useless, and his speech so much affected as to be unintelligible to strangers.

The defendant answers to this, that sometime in the year eighteen hundred and twenty-six testator had a stroke of paralysis, which deprived him in a great measure of the use of his right arm and right leg, and materially impaired his speech; but he could move about with assistance, and visited the store of the defendant almost daily until within two days of his death. Defendant denies that his mind was so far destroyed as to render him incapable of managing his affairs, but says it was sufficiently vigorous to take an interest in all his concerns and to give a general direction and control to his business. His memory was more than ordinarily good for one so far advanced in years. He always recollected with great accuracy when his rents and the interest on his bonds and notes became due.

The complainant, in support of the charge, has produced a number of witnesses, and their opinions are given at length on the capacity and incapacity of the testator. These opinions in

this and all other similar cases, require to be looked at with caution, and well weighed. It happens, too often, that disability of mind and body are not properly distinguished, and opinions are formed and expressed which on examination are proved to be unsupported.

The first witness of the complainant to this point, came to the conclusion that his mind was in such a state as to incapacitate him from doing business; but on his cross-examination he admitted that he had never taken particular pains to ascertain much about it. He never perceived that his mind wandered, or that he was irrational in conversation, and was not prepared to say that if he had enjoyed the entire use of his speech he could not have transacted business.

Impressions like those of this witness are very naturally formed. The testator had been for many years a man of active business. He was suddenly stricken with palsy, and he could no longer walk or help himself. He was dragged from his house to the store in a little wagon, like an infant; when spoken to he could not respond, or if he made the effort the sounds he uttered were so unnatural as to be unintelligible in a very great degree, except to those who were constantly around him. Under these circumstances, it is no impeachment of the veracity or motive of the witness when it is formed and declared, that his opinions, though honestly entertained, are not well founded.

The next witness, Morris Hancock, expresses no definite opinion on the subject. Ebenezer Smith speaks with great hesitancy. He thought his mind was affected at times, and he appeared to be in a state of second childhood; but he concludes by saying, he "founded his opinion of his incapacity to do business on his general appearance—nothing more than that." A more unsafe guide could not have been taken.

James Newell speaks with more point. He says he thought, from what he saw, that the testator was not capable of transacting business of any kind, in any way. He appeared deficient in mind and memory in particular. He had some conversation on one occasion with the testator, and the testator could not talk;

witness could not understand him, and his recollection and memory appeared far gone. This is the substance of the examination in chief, and it is easy to perceive that the appearance of the testator had much to do with the formation of the witness' opinion. In fact he says, afterwards, that his opinion of the want of mind and memory of the testator was formed "from his appearance, and from what he appeared desirous of saying and could not say, and from indirect answers not directly to the point." Now surely his appearance, and his inability to talk, should have little to do in forming an opinion of the mental capacity of the testator. And as to his giving indirect answers not directly to the point, it ought to be remembered that the witness had already stated that he could not understand him when he attempted to hold conversation with him, and how exceedingly difficult it must have been for the testator to communicate his ideas intelligibly. A conclusion formed from such premises can scarcely be considered safe. It may be remarked, too, that the witness limits this incapacity to "a year or more" before the testator's death. This is very vague; and when it is remembered that the giving up of the note was more than two years before his decease, it may be a matter of question whether the witness' opinion is to be considered as extending back so far as to include that period of time.

Another witness, Henry Freas, thinks testator was incapable of transacting business from the year eighteen hundred and twenty-seven, till his death, in eighteen hundred and twenty-nine. He thinks his mind and body were both affected. He says, as the other witness did, that it was difficult to understand him, and that he could not understand him himself. Again he says, testator tried to talk, but could not so that he could understand him. And yet it is evident from the testimony, that upon observations of the testator, thus imperfectly made and imperfectly understood, the witness rests in part for his conclusion as to mental incapacity; for he says, "sometimes the testator would make such answers that had no meaning in them." And again, "I think I have discovered in some of his answers what was irrational, but I cannot now remember what it was particularly."

David B. Smith also testifies to his inability to transact business, but as he says nothing in regard to the state of his mind, his testimony is not material.

Without any evidence on the part of the defendant, this testimony could scarcely be considered sufficient to overcome the answer; but the witnesses of the defendant place the point in dispute in a clear light, and relieve the court from doubt.

Mary Yorke, the daughter, and Thomas Jones Yorke, the grandson, both testify to the mental capacity of the testator, and Mrs. Yorke refers particularly to the time when the note was given up, and states when and under what circumstances it was done, and what took place at the time.

Mrs. Yorke says, her father appeared to know every thing and understand his business; his recollection appeared to be good. He recollected when the interest was due on his obligations, and would say, "Don't neglect it." The family had no difficulty in understanding him after they became accustomed to his mode of speaking. He was in the habit of keeping the key of the chest where his papers were, and continued to keep it as long as he lived.

Mr. Yorke testifies further, that for three years before his death, the testator was afflicted in body, and lost the use of his right side. It was occasioned by palsy. He retained the use of his faculties generally. When he was afflicted with unusual sickness, his faculties were not so acute as in general health. His incapacity to do business arose from his physical and not from his mental infirmities. His business was generally transacted by his son Thomas Jones, under his direction, and he always seemed to understand the nature of it. His memory was as retentive as usual; he recollected the amounts of his bonds and notes, by whom given, and the amount of interest due; thinks a person could not have obtained money from him without his receiving value for it. He could generally make himself intelligible to the members of his family; sometimes there would be difficulty in understanding his meaning, but he was remarkable for persisting in his efforts until he made them understand

him. He was able to read. He was in the habit of reading newspapers, and he could read writing.

These witnesses are of the family of the testator. They knew him intimately, and could therefore speak with more confidence on the subject of his capacity than any others. Making due allowance for any natural bias which may be supposed to exist on their minds, I am of opinion that their evidence, added to the answer, is sufficient, notwithstanding the evidence on the other side, to inform the court, and govern its decision, as to the general capacity of the testator.

To this may be added the statements of Ann Hamilton, also an inmate of the family, who was called as a witness by the complainant. She says, that up to the time of the second attack, which was about forty-eight hours before his death, the testator directed things about the house, and paid the wages due her. He reckoned up himself what was due her, and took the money out of a purse he carried in his pocket, and settled. She cannot say when any such payment was last made, but it was within six months before his death. David C. Williams speaks also as to the capacity of the testator, and in favor of it, but it is unnecessary to pursue the subject further.

Mary Yorke testifies as to the giving up of the note. She remembers there was such a note, but cannot answer as to the date or amount. She says, "I went to the chest on that occasion to look over some papers on which money was due, and to get such papers. My brother called the attention of my father to that note. My brother said to him, 'Father, you may or will give up this note to me.' My father held it in his hand, looked at it for a few moments, and then said, 'Take it.' My brother took possession of it. My father then handed back the bundle of papers to be restored to the chest. My father's health at that time was very good. About this time his health was much better than at any other period of the three years above spoken of." "He knew what bonds and notes he had in that bundle; he recollected when the interest was due on the notes and bonds; he generally knew about the time the interest was due, and would say,

'Don't neglect it.' This was his general habit up to his death. When he told my brother to take that note, I think he understood it perfectly. He seemed to be perfectly willing to give it up. He remarked when we were leading him away from the chest, at the time this note was given up, 'There will be enough for you all.'" On her cross-examination, she says, "When the note of my brother was taken out of the chest, I drew it out of the bundle. My father handed it to my brother. I handed it to my father. My father looked at the indorsement on the note. I suppose he could read it, or he would not have known it to be the right paper. Don't know if the sum was indorsed on it. I had never seen the note before. I don't think I knew before that time that my father held a note against my brother."

This is the whole of the evidence as to the giving up of the note. I cannot say there was any fraud in this transaction. If the testator knew what he was doing, (and there is nothing to lead to a contrary conclusion,) he had a right to do with his own as he pleased. There does not appear to have been any inducement held out, nor any persuasion used. The act was voluntary on the part of the testator; and whether it was actually in consideration of services rendered since the making of the will, as the defendant alleges in his answer, or whether it was a mere gift, without any valuable consideration passing, can make no difference in this investigation. The question before the court is a question of fraud; and if the testator was capable of doing what he did, and there were no deception, imposition, or other undue means used to accomplish the object, there could be no fraud, and of course there is nothing by which the decree of the orphans' court can be impeached.

As to the amount of the note, there is nothing to induce a belief that the defendant has misstated it in his answer. There was an effort made to impeach the testimony of Mrs. Yorke in relation to this note; but I think the construction put by counsel on the evidence of Rebecca Roberts was not the true construction, and that when her evidence is taken in connection with that of David I. Smith, the apparent difficulty is removed.

5. Another charge against the defendant is, that he has not accounted for the moneys received by him as agent for his father, while he transacted his business for three years before his death.

Upon this part of the case much has been said. It is shown that Jones the executor transacted generally the money concerns of his father for two or three years before his death, and that he received considerable sums of money. An estimate has also been made of the rents of the property; and it is sought to charge all these against the defendant, or at all events, to call on him to show what has become of them, and to charge him with what he cannot reasonably account for. And further, because he has not so accounted in the orphans' court, it is sought to impeach the decree, on the ground that the omission was fraudulent.

The defendant insists that no such liability attached to him. He says, that during the time he assisted his father in the transaction of his business, he kept no account or memorandum of the interest money received, or the debts collected by him, and paid over to his father, or the amount of the yearly income of the testator, or the rents and profits of his real estate, nor is it now in his power to exhibit an account thereof; that he was not the trustee of his father, nor his regularly constituted agent, although he received money for him and gave receipts for the same, owing to his father's inability to write; and that the money he received on account of his father, he paid over to him, without keeping any account or making any memorandum to which he can refer.

There is nothing to contradict or call in question the answer on this point; nothing to show that any part of this money was ever appropriated to the use of the defendant, or unaccounted for to the testator. If there were, the case would be different. But it appears to me, that without such proof, it would be exceedingly difficult to compel an account, even if no legal impediments existed such as are set up in bar in this case. Surely, then, there can be no pretence to disturb the solemn decree of the court. If more money than was necessary or usual, was spent in the family for the last three years of the testator's life, it was done under his own direction. Four hundred dollars he distributed among

his children within six months before his death. No fault is found with that proceeding. This constituted a part of the sum received. If a sufficient residue cannot now be found, no blame can attach, much less can any fraud be imputed, to the defendant.

6. There is one other charge which I think it proper to notice, viz.: That the decree of the orphans' court, as containing and declaring the balance in the hands of the executor, was procured by fraud, and should be set aside.

If by this charge it is intended that the decree of the court should be set aside for fraud existing in the component parts of the account, as well as the manner in which it was obtained, then the principal part of it has been already considered. But whether this be the meaning or not, no part remains to be looked at but the mode of procurement. In this I perceive nothing at which exception may be taken, unless it be the settlement or compromise with David B. Smith, and I cannot see that there was any thing fraudulent in that, or any thing about which the complainant had just cause of complaint. Dr. Vanmeter might have filed exceptions to the account if he had thought proper to do so. He took none. They were put in by Smith. If so done by agreement with Smith, and the defendant, knowing the fact, had made an arrangement with Smith to stifle investigation, it would have been fraud. But there is no charge of any collusion with Smith; and I think, under the circumstances, it was entirely justifiable in the defendant to buy his peace. The matter had once been investigated before the orphans' court, and they disagreed and came to no decision. It was ordered to be heard anew; and pending that hearing, the defendant says, that for the sake of peace, and to quiet an unhappy family dissension—and more than all, perhaps, to save the feelings of his sister, who was subjected to repeated examinations, and was greatly agitated by them, he agreed to pay Smith ——— dollars more than his share under the decree, and close the controversy. It does not appear on the face of the bill that there had been any previous investigation. The inference to be drawn from the allegation there made is, that the compromise took place before the

material facts had been disclosed. The complainant says, that the investigation in the orphans' court, so far as it proceeded, fully disclosed the fraud which had been practised on him in obtaining the receipt; whereas the truth is, the whole matter had once before been under the consideration of the court.

I have now examined the different complaints or charges, after endeavoring to arrange them, so that if any were found to be supported, it might be seen whether they could have any legal or equitable operation as against the decree. I have considered every thing that appeared to me in any degree material; and I have satisfied myself that the charges are not sustained. In coming to this conclusion, I can scarcely hope to be so fortunate as to satisfy both parties of its correctness. If they will do me the justice to believe that I have faithfully and anxiously examined the cause with the desire of doing right, it is perhaps as much as I ought to ask. It is always a relief to know that if I have erred, the law has provided a remedy.

Let the bill be dismissed, with costs.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF THE STATE OF NEW-JERSEY.

APRIL TERM, 1831.

Patty Day v. William Day.

In ordinary cases, where a testator is in health and of ability, it is not necessary to show that the will was read over to him, or that he knew the contents of it. The legal presumption in such cases is always in favor of the will; and he who seeks to impeach it must show conclusively that the testator was imposed on, or that there was some mistake whereby he was deceived.

But where it appears affirmatively that the testator did not read the will himself, and that it was not read to him, it must then be shown to the satisfaction of the court that he was in some other way made acquainted with the contents of the instrument and approved them.

So if the testator be incapable of reading the will, whether the incapacity arise from blindness, sickness, or any other cause, the rule is the same, and the burden of proof is thrown on the person offering the will.

If it be established either by direct evidence, or by circumstances so conclusive as to admit of no reasonable doubt, that the will in question was truly copied from a previous will, with the contents of which the testator was acquainted, the instrument will be admitted to probate although it was neither read by him nor in his hearing.

Or if it can be shown that the will in question is substantially in accordance with the instructions of the testator, it may be considered as sufficient evidence that he was acquainted with its contents.

[Day v. Day.]

If a prior will be revoked by a subsequent one, and both be improperly destroyed, the contents of the first instrument cannot be established as the testator's will, although the contents of the second will cannot be ascertained.

It is usual to allow the costs of both parties incurred in contesting a will to be paid out of the personal estate, except where it appears that the conduct of one or other of the parties is frivolous, oppressive or fraudulent.

Counsel fees should also be allowed to the executor, who offers the will for probate, and in proper cases counsel fees may be allowed to both parties out of the estate.

On appeal from the decree of the orphans' court of the county of Essex, refusing probate of a paper writing purporting to be the last will and testament of Amos Day.

I. H. Williamson, for the caveator and appellant.

Wall, for the executor.

The Ordinary. Amos Day, late of the county of Essex, died on the seventeenth of March, eighteen hundred and thirty. The paper writing which is sought to be established as his last will and testament, bears date and was executed on the third day of the same month of March. On the twenty-seventh day of March, Patty Day, the widow, filed with the surrogate a caveat against proving any instrument purporting to be the will of the deceased. The case came up in due course of law for investigation before the orphans' court. The caveator insisted, on the hearing below, that the execution of the will was not sufficiently proved to entitle it to probate; or if it was, that the evidence showed it to have been procured by fraud and misrepresentation, in which case it could not be considered as the will of the testator. And the caveator further insisted that a former will, proved to have been drawn by Dr. James R. Camp, and which had been, as was alleged, improperly destroyed by the respondent, should be admitted to probate as the last will of the deceased. The executor, on the other hand, contended that the will was sufficiently proved, and that the charge of fraud and misrepresentation was wholly unsupported.

The court, after hearing the evidence and arguments of counsel, adjudged that the caveat was supported, and that the will was not entitled to probate; and they further adjudged that "the former will made and published by the said Amos Day, deceased, and drawn by James R. Camp, the contents of which appear in the testimony of said James R. Camp, is not entitled to probate," and that the application for that purpose be refused. They also adjudged that all the evidence taken of the declarations of Amos Day, on the subject of the disposition of his property, made previous to the execution of his first will, drawn by James R. Camp, be overruled, except the evidence of the instructions given by the deceased for drawing the will. And the court further ordered, that the costs of the suit on both sides, including counsel fees, be paid out of the personal estate.

Both parties have appealed: the executor from that part of the decree which refuses probate to the will offered by him, and the widow from that part which refuses probate to the will called the Camp will, and also from those parts that overrule certain testimony and award the executor costs and counsel fees, to be paid out of the estate.

The first question which I shall consider in the investigation of this case is, whether the factum of the will offered by the executor is sufficiently made out.

It is admitted on both sides, that the formal execution of the instrument, so far as regards the signing and publication, is substantially proved. The testator affixed his name in the presence of all the witnesses, and acknowledged the instrument to be his last will and testament. The difficulty grows out of the question whether it is sufficiently manifested that the testator understood the contents of the instrument he was signing. In ordinary cases, when a testator is in health and of ability, it is not necessary to show that the will was read over to him, or that he knew the contents of it. The legal presumption in such cases is always in favor of the will; and he who seeks to impeach it, must show conclusively that the testator was imposed on, or that there was some mistake, whereby he was deceived.

In this case it is without question that the testator did not read the will himself. It was not in his possession so as to afford him an opportunity; and if it had been, he was so weak and low as to be unable to do it. It is also clear, that it was not read over to him. It must then be shown to the satisfaction of the court, that he was in some other way made acquainted with the contents of the instrument, and approved them. In this case the presumption of law fails; and it becomes the duty of the person offering the will, to show that the contents of the paper were fully made known to the testator. So if the testator is incapable of reading the will, whether the incapacity arise from blindness, sickness, or any other cause, the rule is the same, and the burden of proof is thrown on the person offering the will: 1 *Swin.* 96; 4 *Burns' Ec. Law*, 56. And in the case of *Billinghurst v. Vickers*, 1 *Phill. Ec. Rep.* 187, it was held, that when the capacity to read is doubtful, it must be shown that the will was read over, or that it conforms to the instructions given.

It appears by the testimony, that in the summer of eighteen hundred and twenty-nine, the testator procured Dr. Camp to draw his will. Some time after it was executed, he was desirous of making an alteration in the disposition of his property, and had another will drawn by Dr. Camp, in which he gave to his daughter Mary the sum of three thousand dollars, instead of two thousand dollars, as given in the first will. During his last illness, being still dissatisfied with the provisions of his will, especially as they related to his daughter, he sent for his son William, in whom he appears to have placed unbounded confidence, and communicated to him his intention of altering his will. William drew a new will from the Camp will, taking that as the basis, and making such alterations as the testator directed. He was employed in this duty for a number of hours, by the bedside of the testator. Being desirous of consummating the business, the testator inquired of William whether the will was almost ready to be signed. William said it was almost ready; that he had written one copy almost through, and had made a mistake in three or four, or four or five lines, and in consequence of the

mistake he had commenced another copy, and had got it almost done, and that it would be ready in a few minutes. He was at that time copying from the Camp will. There was also another paper on the table at the same time, which the witness who testifies to these facts supposed to be the one in which the mistake was made. After the drawing of the will was finished, it was discovered that there was not room on the paper for the signature of the testator and witnesses. It was suggested by some one that it would answer to attach to it another piece of paper with wafers, on which the testator and witnesses might sign, and it was done so. The will was then executed and sealed up, and was, together with the Camp will, given by William to Mrs. Day, who looked them up in the secretary or drawer. The next evening William came over with another paper which he had prepared. He told the testator, in the presence of some of the witnesses, that the will which had been executed the evening before had a piece of paper sealed to it for the signatures; but he thought it would not look well, and he had therefore drawn another one, which was an exact copy from the one already executed. To this observation the testator said nothing. One of the subscribing witnesses says, that William asked the testator if he should read the will, and another one thinks that such inquiry was made of him; both unite in saying that the testator still remained silent. The other witness heard nothing on the subject of reading the will, though present in the room. William then asked testator if he would sign the will. Testator spoke and said, If I do, it must be quickly. He was then bolstered up in bed, and the will was signed. The will of the night before, and also the Camp will, were then put on the fire by William and destroyed.

It is plain, from the history of the transaction, that the testator did not acquire any knowledge of the contents of the paper from reading it or hearing it read. He must have reposed himself implicitly upon the assurance of William, that it was a true copy of the will executed the night before. I think it right to infer, that that will was correctly drawn, according to the in-

tention and direction of the testator. It was done in his presence, and not in haste; and I see nothing to lead to the suspicion that any deception or misrepresentation were made use of by William toward his father. If, then, the fact can be established that this last will was truly copied from the one executed the night before, there can be no difficulty in admitting it to probate. This fact may be made out either by direct evidence, or by circumstances so conclusive as to admit of no reasonable doubt.

As to direct evidence, there is none. No witness has testified that this paper is a copy of the one executed the preceding evening. No person has proved the contents of the first will drawn by William, so as to compare them with the will now offered for probate, and thus ascertain whether they are the same or not. On the other hand, it is perfectly clear that it could not have been copied from the paper executed on the preceding night. That was given to Mrs. Day, and was locked up with the Camp will in the drawer; and it remained there, as we have every reason to believe, until after the last will was executed.

It is contended, however, that there is evidence to show that William, when he drew the first will, made two copies; that in one of the copies he had made some mistakes, and consequently drew a second one, and therefore that he was enabled from this first draft to prepare an accurate copy on a paper sufficiently large to admit of the signatures of the testator and witnesses.

The facts as I understand them are these, according to the testimony of John C. Mooney and Timothy Burnet, jun. William, in preparing the first draft, made a mistake in three or four, or four or five lines; he had written some parts twice over; he had got the copy almost ready for the testator to sign it, but in consequence of the mistake he had commenced another copy. This is what William told his father at the time the first will was executed. But that this draft was in conformity with the will, actually first prepared and executed; that it was preserved by William and taken home with him; and that the second will he prepared is a copy of it, are matters which rest only in supposition. No one saw this rough draft after the execution of the

first will; no one saw him write the second will; and no one appears to have known the contents of it, until it was opened after the testator's death. It would be entirely unsafe for the court to rest upon such evidence.

If, however, this will can be shown to be substantially in accordance with the instructions of the testator, it may be considered as sufficient evidence of the fact in question.

Here, too, we are met with difficulties. There is no person to testify what those instructions were; no one heard the conversation between the testator and William, while the first will was preparing. There is evidence, however, to show, that the testator wanted to have his will altered. We have his previously declared intentions on the subject, showing in what particulars he designed the alterations to be made. If these previously declared intentions are to be considered as evidence of the instructions given to William—and I know of no other—then I have no hesitation in saying that the will does not conform to the instructions given.

The testator had one daughter, the issue of his third marriage. She was the child of his old age, and of tender years. He thought her to be an uncommonly smart child, and doating on her, as was natural, he appeared determined to give her a good education, and to make an ample provision for her in the disposition of his estate. In the first will drawn by Dr. Camp, he had given her an absolute legacy of two thousand dollars, the interest to be paid to her annually until she arrived at age, and then the principal. Fearing, however, that he had not done enough for her, he shortly after procured Camp to draw him a second will, in which he gave Mary three thousand dollars instead of two thousand. Just before his death, he expressed himself dissatisfied with this will, and the ground of his dissatisfaction was that he had not done enough for Mary. William is called in to alter the will, and it is done. Under the present will, Mary receives no money at all, nor is there any provision made for her education or maintenance. She gets nothing until the marriage or death of her mother, at which time she is to have

what is called the homestead property, valued at three thousand dollars, with a limitation over to the other branches of the testator's family in case she should die under age. Nothing is given to Mrs. Day for the education of this favorite daughter. The provision made for the widow under this will, is substantially the same as under the Camp will.

The difference, as it regards Mary, in the two wills is this. By the Camp will she was to receive during her minority the interest of three thousand dollars, or one hundred and eighty dollars per annum, and the principal when she came of age; and this was absolute. At the same time her mother was provided for. By this last will, she is altogether dependent on her mother until the marriage or death of her mother; while at the same time the mother is no better provided for than she was under the Camp will; and at the mother's marriage or death, Mary receives the homestead house and lot, with the furniture, valued at about three thousand dollars, subject to the limitation over, as already stated. Surely this cannot be considered as an alteration advantageous to Mary. She must needs be deprived, in a great degree, of the advantages of education, and especially of such an education as her father intended she should receive. The scanty income arising from her mother's property, will not afford it.

There is some evidence to show that the testator was desirous of giving to Mary land instead of money; that he considered it more safe, and was desirous of securing her property in such way that it would not be lost to her by the negligence or dishonesty of his executor. But there is nothing to show that in making such change he intended to give her less in land than he had given her in money. His avowed object was to give her more. It is evident, however, that the provision under the last will is much less valuable than that under the first.

There are some other circumstances that might be adduced to show that this will does not conform to the instructions given, so far as those instructions are to be gathered from the previously declared intentions of the testator; but I deem it unnecessary to

notice them in detail. They are not very important in themselves, separately considered; when taken together they are deserving of some weight.

Without going into the question of fraud, which was discussed at the bar, I am willing to say that the factum of the will is not made out, and therefore that the orphans' court did right in not admitting it to probate.

2. The second point to be considered is, whether the will drawn by Dr. Camp, and the contents of which it is contended are sufficiently proved by him, shall be established.

There are cases in which the contents of a will may be proved and may take effect, although the will itself is destroyed; but this is not one of those cases. Here was a will actually and regularly made and executed by the testator, subsequent to the Camp will. This was a perfect revocation of the Camp will: *Swin.* 525; and it was intended to be so by the testator. There is no evidence that he ever intended to restore it. If the contents of any of the former wills could be admitted to probate, it must be of the first will drawn by William. It does not follow, that because the contents of that will cannot be ascertained and established, therefore the contents of some prior will shall be established. Admitting that the Camp will was improperly destroyed by William, the other will was destroyed at the same time, and in the same improper manner; and no argument *in odium spoliatoris*, can be drawn in favor of the Camp will, that does not apply more strongly to the other.

3. The only remaining inquiry is as to the costs.

The orphans' court ordered the costs of both parties to be paid out of the personal estate. This is the usual course of the court, except when it appears that the conduct of one or other of the parties is frivolous, oppressive or fraudulent. It is the duty of executors to present wills for probate, and if disputed, to have their validity tried in the mode prescribed by the law. If they fail in the attempt, the general rule is to allow them their costs out of the estate. It would be unjust that they should suffer loss in the honest discharge of their duty.

In this case, it is said, the executor, to whom costs were given, was the drawer of the will, and interested in it; that he took advantage of the confidence placed in him by the testator, and fraudulently imposed upon him. If the orphans' court had thought proper to place itself on the ground of fraud in the procurement of this instrument, it would have been wrong to award costs to the executor; but there is no evidence of that being the case; and this court being of opinion that the factum of the will is not sufficiently proved, and not knowing but the court below took the same view of the subject, is not prepared to say they erred.

Looking at the case as it is presented on the question of fraud, I am willing to admit there are suspicious circumstances, unexplained, from which fraud may be presumed; yet I am not prepared to say that they are of such a character as to induce the court to say, on a question of costs, that the will was fraudulently procured, especially when the cause has been decided on another and more satisfactory ground.

I am satisfied, then, to affirm this part of the decree, unless it is made to appear that the costs and expenses allowed were illegal and unreasonable. In this case counsel fees were allowed, and it was said at the bar that such allowance was unlawful and without precedent. I have not so understood the law or the practice. As it regards the executor, it is surely right that he should be reimbursed his reasonable expenses. It is uniformly allowed when matters of account are litigated before the orphans' court; and I think, upon the same principle, it should be allowed where, in the discharge of his duty, he undertakes to prove a will. Generally speaking, counsel are necessary in both cases.

In the case of *Liddel* v. *McVicker*, the orphans' court of Morris allowed Mr. McVicker, as administrator, the counsel fees paid by him in litigating his account before that court. The case went up to the supreme court by certiorari, and this allowance was assigned as one of the grounds for reversal; but the court said they saw no sufficient objection to the item: 6 *Hals.* 44.

In the case of *Dufford's will*, decided some few years back, the orphans' court were equally divided on an application for probate. The cause came up into this court, and probate was refused by the ordinary, (Williamson,) on the ground of the testator's incapacity. The costs in that case, including counsel fees on both sides, were paid out of the estate.

There is one other ground of appeal, which relates to the overruling of evidence; but the view taken by the court renders it unnecessary to give any opinion on that point.

The result is, that the decree of the orphans' court is in all things affirmed. Amos Day must be considered as having died intestate, and letters of administration issue accordingly.

OCTOBER TERM, 1831.

Timothy Delany v. John Noble.

A decree of the orphans' court, revoking letters of administration previously granted, and granting new letters to the same person, is within the provision of the twenty-first section of "An act to ascertain the power and authority of the ordinary and his surrogates," &c. (*Rev. Laws*, 782,) and an appeal from such decree must be taken within thirty days, although no new application for letters be made and no citations issued for parties to come in and be heard.

Where letters of administration are revoked as informally or illegally granted, new letters may be granted to the same person, or, it seems, to any other, without a new application.

Appeal from a decree of the orphans' court of the county of Hunterdon, granting letters of administration upon the estate of James Maher, to John Noble.

The cause came before the court upon a motion, on the part of the respondent, to dismiss the appeal for irregularity, on the ground that it was not demanded within thirty days after the decree.

Hamilton, for respondent, in support of the motion.

Halsted, contra.

THE ORDINARY. On the twelfth of August, eighteen hundred and thirty, James Maher, formerly of Ireland, died in the city of Trenton, where he had resided for a number of years before his death. Shortly after his death, John Noble applied to the surrogate of the county of Hunterdon for letters of administration, and they were granted to him by the surrogate. Upon this, Timothy Delany, alleging himself to be the nephew and next of kin of the decedent, presented a petition to the orphans' court, setting forth that fact, and praying that the letters of administration thus granted as aforesaid to John Noble might be revoked, and that administration of the estate might be granted to him. Depositions were taken, and the matter came on to be heard before the said orphans' court, on the petition aforesaid, in the term of February last; and thereupon the orphans' court revoked the letters of administration thus granted as aforesaid, and, at the same time, granted new letters of administration to the said John Noble.

On the eighth of April, eighteen hundred and thirty-one, Timothy Delany filed his petition in this court, alleging that the decree, so far as regarded the granting of new letters of administration to Noble, was erroneous, inasmuch as no new application had been made by the said Noble for administration, and appealed from that part of the decree.

The respondent sets forth in his answer, under a protestando as to the legality of the appeal in point of time, that upon the hearing before the orphans' court, on the application aforesaid, it appeared that the letters of administration had been issued to the respondent by a clerk of the surrogate, he himself being confined by severe illness; and that for that reason the court saw proper to revoke the original letters; that witnesses were examined, and a full hearing had before the court, as to the right of administration, upon which the court were of opinion that Delany was not

next of kin to the intestate; and being of opinion, further, that the said Noble was a fit person to be entrusted with the management of the estate, they made the decree complained of.

The question made before this court is as to the propriety of the appeal; it not having been made within thirty days from the time of the decree.

By the twenty-first section of the act entitled "An act to ascertain the power and authority of the ordinary and his surrogates," &c. (*Rev. Laws*, 782,) the surrogates of the different counties are required to take the depositions to wills, administration, &c., and to issue thereon letters testamentary and of administration; but in all cases where disputes happen respecting the existence of a will, the fairness of an inventory, or the right of administration, the surrogate shall issue citations to all persons concerned to appear at the next orphans' court, when the matter shall be heard in a summary way and determined by the court, subject to an appeal to the prerogative court, if demanded within thirty days after the sentence or decree of the court.

It was admitted, that if the case came within the provisions of this section of the act, the appeal was too late, and must be dismissed; but it was contended that it was not within the section; that in this case no new application had been made by Noble, and no citations had been issued for parties to come in and be heard; that the whole proceeding, therefore, was irregular, and the decree not having been made under the authority of the section, the appeal was not regulated as to time by its restrictions.

If there was any informality in the proceedings of the orphans' court, may it not have been occasioned by the act of the appellant himself? His application was that the old letters should be revoked, and new ones granted to himself. When the old letters were revoked for the informality above mentioned, both parties and both applications were before the court, and if they proceeded to adjudicate without the formality of citations, I should doubt the propriety of any objection that might be made by the present appellant. He was fully heard, and can have no ground

of complaint. As to the objection that no new application was made by Noble, and therefore the court committed an error in appointing him, I think it untenable. It is evident the court considered the original application of Noble as still before them, and I think rightly so; but if it were not, I am not aware that the orphans' court are precluded from granting administration to a person who is not an applicant.

I am of opinion, however, that this must be considered as a proceeding under the twenty-first section of the act, and consequently, that this appeal is too late. The orphans' courts have, in all cases of administration where any difficulties arise as to the right, a general jurisdiction; and from their decrees, the statute has given an appeal. The jurisdiction is not taken away, or the rights of the parties as to the appeal affected, by the fact that the court, in the exercise of their powers, may have acted informally. One of the objects of the appeal is to correct such erroneous proceedings, by which a party may have been aggrieved.

If the appeal is not properly taken under this section of the act, it appears to me that the proceeding by way of appeal to this court for redress is altogether incorrect. There is no appeal given except by that section. And by the thirty-third section it is provided, that all final sentences or decrees of the orphans' courts in the several counties of this state, where no appeal is given to the prerogative court, shall be subject to removal by certiorari into the supreme court.

In either view of the case, the appeal must be dismissed.

This case bears no resemblance to that of *Ten Brook* v. *M'Colm*, cited at the bar from 5 *Hals.* 333. That was on certiorari to the supreme court. The orphans' court of Somerset revoked letters of guardianship, which had previously been granted to Ten Brook, and granted them to M'Colm. Ten Brook sought redress by certiorari, and it was objected that the proper remedy was by appeal to the prerogative court. But the supreme court said, it was a case in which no appeal was given by the statute; and inasmuch as in all such cases the statute had

provided relief by certiorari, that the plaintiff had pursued his proper remedy, and the motion to quash the suit was overruled.

Appeal dismissed, with costs.

WILLIAM H. SLOAN v. JOHN S. MAXWELL and others.

There is no distinction in the degree of mental capacity requisite for the execution of a will of real estate, and that requisite for the execution of a will of personal estate.

To constitute a sound and disposing mind and memory, it is not essential that the mind should be unbroken, unimpaired, unshattered by disease or otherwise. The charge of chief justice Kirkpatrick, in *Den* v. *Johnson*, 2 *South.* 454, commented on.

The standard of testamentary capacity laid down by judge Washington, in *Harrison* v. *Rowan*, 3 *Wash. C. C. R.* 580, and in *Den* v. *Vancleve*, 4 *Wash. C. C. R.* 262, approved and adopted.

The law expects from the subscribing witnesses peculiar care, caution and circumspection.

The mere opinions of witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them, in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing.

Whenever the formal execution of a will is duly proved, he who wishes to impeach it on the ground of incompetency, must support by proof the allegation he makes, and thereby overcome the presumption which the law raises of the sanity of the testator.

THIS cause came before the court upon an appeal from a decree of the orphans' court of the county of Hunterdon, denying probate of an instrument propounded as the last will and testament of John Maxwell, late of the county of Hunterdon. The will was executed in the month of August, eighteen hundred and twenty-five, and the testator died in February, eighteen hundred and twenty-eight, at the age of eighty-eight years. The will was exhibited for probate by William H. Sloan, one of the executors named therein; and a caveat against proving the same was filed by John S. Maxwell and others. On the hearing of

the cause in the orphans' court, the judges were equally divided in opinion. Thereupon, by consent of parties, in order that an appeal might be taken, a decree was made on the twelfth day of December, eighteen hundred and twenty-eight, "that the paper writing offered for probate was not the last will and testament of John Maxwell, deceased, and that the same be not admitted to probate, but be set aside, made void, and for nothing holden." The ordinary having been of counsel with one of the parties, chief justice Ewing, and justice Drake, two of the justices of the supreme court, were by virtue of the provisions of the act of the nineteenth of February, eighteen hundred and thirty, (*Harrison*, 297,) called by the ordinary to sit and advise with him on the hearing of the cause. The opinion was delivered by Ewing.

Saxton, for appellant.

Wurts, for respondent.

OPINION. John Maxwell, of Flemington, in the county of Hunterdon, died in the month of February, eighteen hundred and twenty-eight, at the advanced age of eighty-eight years. During the greater part of his life he had resided in the county of Sussex, where he was distinguished for industry, integrity, usefulness, and consequent respectability. He bore arms for his country in her contest for independence, and afterwards, in common with his copatriots and fellow-citizens, enjoyed and appreciated the rights and privileges won by their wisdom and valor and sufferings. Besides a faithful discharge of the duties of private life, in rearing a numerous family by wise precept and instructive example, his services were incessantly invoked, freely bestowed and eminently useful among his neighbors, and in the county, in various official stations, and especially as a magistrate and judge. Having reached old age, and acquired a competency of this world's goods, he withdrew from the active pursuits of business, removed about the year eighteen hundred and thirteen

to Flemington, and resided there respected and esteemed the remainder of his life. Domestic afflictions there reached him, disturbed at times his peaceful retirement, and diminished in some measure the property he had gathered by his care and toil; enough, however, remained to render him comfortable, and since his decease to form the subject of dissension and controversy among his descendants.

In the month of August, of the year eighteen hundred and twenty-five, he went into one of the stores of the village. No one accompanied him, nor, so far as is known, did any one direct, advise, request or prompt him to go thither, or to execute his ostensible purpose. He found there the proprietor of the store, Samuel D. Stryker, the clerk, Theodore Ellis, and one of the neighbors, Charles Bonnel. He carried in his hand a paper, and said to them, "I have got here a paper which I wish you to sign." One of them observed to him, "I presume it is your will." He answered in the affirmative, and laid it on the counter. His name was already subscribed to it in his own hand-writing, which was familiarly known to the persons who were present. He put his finger on the seal, and acknowledged it to be his hand and seal, and the instrument to be his last will and testament, either in terms, or by affirmative answers to questions put to him by one of the witnesses. The three persons signed their names to the will in his presence. Very little conversation occurred; soon after the attestation, he folded up the paper, and carrying it with him, left the store.

In about two years and six months afterwards, Mr. Maxwell died, and this paper was exhibited in the surrogate's office for probate as his last will and testament. A caveat having been filed, the matter was brought before the orphans' court, where, after hearing the examinations of many witnesses, the judges were equally divided in opinion; and by consent of the parties, in order that an appeal might be taken, a decree was made on the twelfth day of December, eighteen hundred and twenty-eight, "that the paper writing offered for probate was not the last will and testament of John Maxwell, deceased, and that the same

be not admitted to probate, but be set aside, made void, and for nothing holden."

An appeal was accordingly taken. His excellency the governor and ordinary, having been of counsel for one of the parties, the appeal, and the evidence, and the arguments of the counsel, have been heard before the subscribers, two of the justices of the supreme court, called to this duty by the ordinary, in pursuance of the statute. And we are now to recommend to him the decree which in our opinion ought to be made, and to communicate to him the reasons on which our recommendation is founded.

The mental capacity of the decedent is the line of strife between the parties. When the question of competency or incompetency to execute this interesting and important function is settled, there is no farther ground of controversy. The formality of the execution of this instrument as a will of personal estate, is abundantly and conclusively shown, and has not been made the subject of discussion. As a will of personal estate it has been offered for probate. The probate of it as such, is alone the extent of the jurisdiction of this court, or, perhaps more correctly speaking, of the conclusive jurisdiction of this court; for, whether sustained or repudiated here, it may, notwithstanding, as an instrument for the conveyance of lands, or in other words, as a will of real estate, be the subject of inquiry, and may be decreed valid or invalid in another tribunal. We may at once, therefore, disclaim any intention to examine the conformity of the execution of this instrument to the formalities requisite to constitute a will of real estate. The great question involved here is common to the instrument, whatever may be the description of property which it affects. There is no difference or distinction of which we are aware, in the degree of mental capacity resulting from the different kinds of property. The rule as to personal and real estate is the same. In 6 *Co. Rep.* 24, it is said, "If he were of sane memory at the time of making the testament of the goods, he could not be of non-sane memory at the time of the making of the will of the lands, both being made at one and the same instant."

Our first duty, then, in the progress of this inquiry, and before we open the evidence of this particular case, is to fix, so far as we may be able, the standard of capacity. Who is competent? What degree of capacity is requisite and sufficient to make a valid will? An answer, in general terms, is easily found; but to furnish an answer specific, practical, and readily to be applied to any given case, is an arduous task, and has frequently embarrassed the highest sagacity and discernment. When we are told, in the language of our statute, that he who is "of non-sane mind and memory" cannot make a will, or what is the same idea, the one being an affirmative and the other a negative mode of expression, that he who makes a will should be "of sound and disposing mind and memory," we have gained very little practical instruction or information. For the question immediately recurs, What is a sound mind? What is a disposing memory? What state or what degree of either is thereby contemplated and expressed?

The exposition by Godolphin sheds but faint light. "To be of sound and perfect memory," says he, "is to have a reasonable memory and understanding to dispose of an estate with reason:" *Godolphin, Orp. Leg.* 25. The instance he puts, after stating the rule that "old age alone doth never deprive a man of the power of making his testament," is rather intended as an example of positive incapacity, than to give a general test for the solution of this important inquiry. "When a man, by reason of extreme old age, is become even a child again in his understanding, or rather in the want thereof, or by reason of extreme old age or other infirmity is become so forgetful that he knoweth not his own name, he is then no more fit to make a testament than is a natural fool:" *Godolph.* 26.

The light is somewhat, though not satisfactorily or sufficiently increased, by the *Marquis of Winchester's case*, 6 *Co.* 23: "It is not sufficient that the testator be of memory, when he makes the will, to answer familiar and usual questions, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason; and that

is such a memory which the law calls sane and perfect memory." Now if the meaning here is, that the disposition of the testator's property by the will should be conformable to what the witness who is to testify of his capacity, or the judge who is to decide on it, may deem reasonable and discreet, there is nothing more untrue; for if the capacity of the testator is admitted or established, the disposition he may have made must prevail, however indiscreet and unreasonable it may be; as if he should give all from meritorious children to an utter stranger. *Stat pro ratione voluntas.* And if the meaning is, that in a doubtful case the disposition may be scrutinized, there are few things more unsafe, since the testator may have most satisfactory motives and reasons, of which others are uninformed, to withhold or guide his bounty. But if the meaning is, that he must possess understanding and reason in order to make a valid disposition, we are brought back almost to the starting post; for, although we are told it is not enough to be able to answer familiar questions, we are still left to ask, What is a competent degree of understanding and reason?

The exposition which was read and urged upon us at the argument, from *Den* v. *Johnson*, 2 *South.* 454, is not satisfactory. "Sound signifies whole, unbroken, unimpaired, unshattered by disease or otherwise." If so, a will can only be made in the spring, or at the latest in the summer, and never in the autumn of life. Nor, indeed, does this passage, taken by itself, and without the explanations and qualifications contained in the charge of which it formed a part, properly convey the meaning of the judge who used it. For he says, "It is true that every discomposure of mind by these causes," (melancholy, grief, sorrow, misfortune, sickness or disease,) "will not render one incapable of making a will; it must be such a discomposure, such a derangement, as deprives him of the rational faculties common to man." And again he says, "If, upon the whole, the jury should be of opinion that the mental powers of the testator were *so far* enfeebled and broken as that she could not make a discreet disposition of her affairs herself, and that the will in ques-

tion was devised by other persons, and only assented to by her, upon being asked, without the power of understanding it, then they ought to find" against the will. And again: "A disposing mind and memory, is a mind and memory which have the capacity of recollecting, discerning and feeling, the relations, connections and obligations of family and blood."

From the opinions delivered by the other judges in their review of the charge, it is obvious they do not sanction or approve the unqualified exposition of the term "sound." One of them said, "The charge was substantially consistent with the law." The other said, its correctness was to be determined by the whole taken together; and that so taken, the definition of testamentary capacity was true; though it should be admitted, in describing the force of the word sound by itself, too strong language had been used.

The remarks of the same learned judge by whom the charge was given, made in the subsequent case of *Den* v. *Vancleve*, 2 *South.* 660, show that the strict construction was not designed by him. "By these terms," (a sound and dispoing mind and memory) says he, "it has not been understood that a testator must possess these qualities of the mind in the highest degree, otherwise very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done, for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

Another of the court in that case said, "I could by no means concur with the chief justice in his exposition of the term sound, as applied to the mind of the testator—"whole, unbroken, unchanged by disease, age or infirmity." Few indeed would be the wills

confirmed, if this is correct. Pain, sickness, debility of body from age or infirmity, would, according to its violence or duration, in a greater or less degree break in upon, weaken or derange the mind, and render it incapable of exercising its full powers, as in time of perfect health. Yet I believe that none have ventured to pronounce that extreme illness incapacitates a testator, or that old age, when memory was impaired and judgment weakened, rendered him incapable of disposing of his property. 'Of sound and disposing mind and memory,' is the language used. The sentence must be taken together, not disjointed, and sound explained in its literal, distinct and separate meaning, unconnected with the subject matter to which it necessarily and evidently refers. Thus taken in connection, it means that the testator, at the time of executing his will, had that soundness of mind and memory enabling him to understand the nature of the instrument he signed and sealed, the relative situation of his family and connexions, the general extent of the property disposed of, and that it was so disposed of as was agreeable to his desire."

Another of the court said, "The execution of a will, the distribution of an estate among a family, is an act of a peculiar character. It is not the prompt and unpremeditated effort of the moment, but the tardy effect of long observation on his family and property, on the claims of duty and the calls of affection. It is frequently the result of the combined reasoning and feelings of years, often meditated on, often resolved, and not unfrequently divulged."

The subject of testamentary capacity was investigated, examined and discussed, with great assiduity, in the cases of *Harrison* v. *Rowan*, and *Den* v. *Vancleve*, in the circuit court of the United States for this district; and the legal doctrines on this topic were stated and explained with great perspicuity and precision by that eminent judge who for many years presided there, and who administered justice so beneficially to the public, and with an ability and reputation rarely surpassed and never to be forgotten.

In the former case, in his charge to the jury, he said, "As to

the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, the disposition of his property in its simple forms. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new."

In the subsequent case of *Den* v. *Vancleve*, judge Washington spoke thus: "He (the testator) must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory: a man in whom this faculty is totally extinguished, cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his under-

standing may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much What was the degree of memory possessed by the testator? as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged, at the time he executed his will?"

Without seeking further to pursue this fruitful subject in the multitude of cases to be found in the English and American books, and without undertaking to give an exposition in language of our own, we shall on the present occasion adopt in substance the doctrine laid down by judge Washington, as the proper exposition of the terms sound and disposing mind and memory, and the correct standard of testamentary competency and capacity. We find it perspicuous, we believe it sound, and we learn it was received and approved by the ordinary in the recent case of the appeal on the will of *Tace Wallace*;* and on this last consideration we much rely, because we have the aid of his deliberation and judgment; and, sitting on the present occasion in his place, we have the satisfaction to know that the claims of the parties before us will be estimated by the same standard as if he had decided upon them.

We now proceed to compare the mind and memory of John Maxwell, as displayed in the evidence before us, with the standard which has been assumed. The point of time at which the

* It is a matter of regret that the opinion in this case, delivered by Vroom, ordinary, at January term, 1831, cannot be procured for publication. The opinion was loaned by the ordinary, and cannot now be found.

testator's competency is to be tested, is that of the execution of the will; his antecedent or subsequent condition is chiefly important as it may bear on that epoch. And we naturally resort, in the first place, to the subscribing witnesses; because they have seen him at the decisive period, and because the law expects from them peculiar care, caution and circumspection; presuming from the fact of the attestation, that they believed him competent, as otherwise they ought not to have given countenance to a deceptive instrument.

The first of them examined was Samuel D. Stryker: he relates the circumstances which attended the execution of the will. He says, "He thinks the testator was capable up to the time of the execution of the will of transacting some kinds of business, but not business generally; he was capable of taking care of his interests as to money matters." "He thinks that as to money matters the testator was rather a smart man for one of his age. The strength of his mind seemed to rest upon his money matters. Deponent thinks that, taking into consideration the inclination of his mind to pecuniary matters, that the will had been made nearly three years before his death and the probability that the testator had access to it and that he might have altered it if any thing was wrong, that he was capable at the time of the execution of the will of making a will; at the same time, however, he wishes it to be understood that he is not clear upon this point, he feels some doubts about it. Deponent would rather say that he was capable, for he thinks the strength of his mind ran upon his property." Deponent says that the testator's "memory was not good at the time of the execution of the will, nor was it very good when the deponent first knew him," which it may be observed was in the year eighteen hundred and twenty, and in the intermediate time repeated transactions of business had occurred between them, chiefly in the negotiation of loans of money for other persons, and in the loan and repayment of money by the witness himself, and in the frequent dealings of the testator at the store of the witness. "Deponent thinks that the testator was capable of making a will at the time this one

was executed, and of disposing of property to the amount of twenty or thirty thousand dollars in a rational way, at the same time, however, he has some doubts about the matter. There are different degrees of capacity, but from all the facts and circumstances of his general knowledge of the testator, he thinks that he was capable of making a will, but at the same time he has some doubts upon the subject." "Deponent says, that if he had wanted to treat with the testator for the purchase of a house and lot of which the testator was the owner, that he should have gone to him. He thinks that he was capable of making a contract and conveyance of his property; that he could not have been overreached, that he understood himself and his property too well. Deponent says he cannot answer the question whether he could have been overreached in making his will."

This witness was intimately acquainted with the testator, having for several years before the execution of the will lived in an adjoining house, and passing the testator's dwelling incessantly to his store. His doubts evidently result from an erroneous conception of the capacity requisite to make a will. He had fixed in his own mind too elevated a standard. If he had known that the capacity may be "very inadequate to the management of other business, as, for instance, to make contracts for the sale or purchase of property," and yet he may be "perfect to dispose of property by will;" if he had known that a man "may not have sufficient strength of memory and vigor of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will," we cannot hesitate to see that his doubt would be dispelled; he would have deemed him competent to make a will, as he thought him "capable of making a contract and conveyance of his property;" and for the same valid reason: "he understood himself and his property too well to be overreached."

This witness relates very few important facts bearing upon the question of capacity; all, however, that he does state are of competency, none of incompetency. Every thing that was said or done by the testator at the execution of the will, was rational,

appropriate, and in proper time and place. Both before and after the execution of the will, he was in the habit of coming to the store frequently and purchasing such articles as he wanted, for which he always paid either immediately or at some short time after. When he did not pay the cash he would generally remember it and come in a day or two and pay; sometimes, however, he appeared to forget the purchase, and on being reminded by the witness or his clerk, he would always recollect and pay the money. Both before and after the execution of the will, he was in the habit of calling at the store of the witness to have his interest calculated and to have moneys overlooked which he had received. Some short time before the will, the witness paid the testator some silver money, which was counted by him.

Theodore Ellis was the next of the subscribing witnesses examined. He went to Flemington in the spring of the year eighteen hundred and twenty-one, left there in eighteen hundred and twenty-four, and after an absence of eleven months returned about a month before the will was executed. While there he was a clerk in the store of Mr. Stryker, and living near the testator, had very frequent intercourse with him. He spoke of the transaction of business with the testator, in dealing at the store, and in making calculations for him, and of having heard him talk of his property, and of his desire to make sale of some of his real estate before the absence of the witness from Flemington. "From my observation," says he, "in the dealings I had with him, he appeared to understand his own interest; whether he was perfect in all his business I can't say, but from what I have heard him say I should suppose he was." After the return of the witness he was not enough acquainted with the testator, he said, to judge whether he was capable of conveying his property by will. He was better able to judge of his capacity eleven months before, than at the time he witnessed the will; but he knew no circumstance to induce him to believe the testator was not competent at that time. Some time before he left Flemington, he heard the testator speak of a house and lot in the village, he had sold to one Large, and had taken back or was about

to take back, from the inability of the latter to pay for it. He thought if the testator had then wanted to make sale of the swamp lot, or the lot in town, he was of competent mind to fix his price and make a transfer and take care of his interest, and he knew not but the testator was competent to have made sale and conveyance of all his real property. After the witness returned to Flemington, which it will be remembered was near the time of the will, he called on the testator, and did not discover any very material difference in him. The testator recognised him, and complained of being unwell.

The witness speaks very sufficiently of the capacity of the testator prior to his absence from Flemington; and although he did not, as he says, see enough of the testator after his return to enable him to speak with certainty as to his competency, yet he neither saw or knew any thing to bring it into doubt, and especially he discovered no material difference in him, which, if it had occurred, would have been apparent to a person who had been absent for months, although it might not have been so perceptible to another who had been in the habit of daily intercourse.

The other subscribing witness is Charles Bonnel. He relates the circumstances of the execution of the will in nearly the same manner as the other witnesses. On the score of capacity, he says, "At the time of the execution of the will, I could not and should not say that the testator was of sound and disposing mind and memory: this was my impression at the time of the execution of the paper." And again: "At the time of the execution of the will, I did not consider the testator of sufficient capacity to make a wise and rational distribution of his property among his connections and family, under the proper obligations and considerations of blood." And yet with these views of the testator, he did not hesitate to attest the will, and under the impression also, as he declares, that the testator at the time knew what he was about, and that the instrument was his will.

From the opinion thus positively expressed by the witness, and from the proximity of his residence to the testator, rendering

their intercourse very frequent and almost daily, we may naturally expect to hear from him the facts on which his opinion was founded clearly and fully detailed, and to have some striking marks of his incompetency exhibited, from which others as well as the witness will be brought to a like conclusion. But a review of his testimony disappoints this reasonable expectation. The weight of an opinion, without reasons to support it, was laid down by judge Washington, in one of the cases already referred to, very correctly, and in conformity with the steady current of authority from the time of Godolphin and Swinburne, in the following words: "The mere opinions of witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing."

Indeed there is even some incongruity in the opinions entertained by this witness; for the question being put to him whether he supposed the testator was at the time capable of managing his estate discreetly and with prudence; he answered, somewhat evasively, "If persons had paid him money, I believe he would have held fast to it and kept it until some person put it out for him." And again: "At the time of making the will, or thereabouts, the old man had sense enough not to trust himself to make a bargain. By this, I mean to say, he had sense enough to know he was not capable of making a bargain or of transacting his business." Now, to take care of money until properly replaced, does not savor of incapacity; and self-confidence is a more usual concomitant of incompetency, especially in old age, than self-distrust.

Mr. Bonnel says he thinks the memory of the testator would not have served him to make a bargain which would have taken ten minutes, but he states no fact and gives no instance of an attempt and failure; here is, then, only an uncorroborated conjecture.

He had "frequently seen the testator in the street inquiring for people whom he said he wanted to see, and was going in a

wrong direction to find them." And who of the wisest among us has not been in a like predicament? But as the witness says this may have been after the will was executed, we need say no more of it.

Mr. Bonnel gave as an instance of the failure of the memory of the testator, that he used to forget his grand-children, which had occurred both before and after the making of the will. He thought he had seen several instances, perhaps a dozen, of his forgetfulness of his grand-children and others. He was able, however, to call to his recollection but one in regard to his granddaughter, Ann Sherrard, who with most of his grand-children then resided in the county of Sussex, and visited him, the witness said, once or twice a year. At one time, on the day of her arrival as he presumed, for she had then her bonnet on, she met the testator near the store, and having inquired after his health, he said, Why, who are you? She told him, and they went into his house together. For the sake of brevity and connexion, some facts of this kind will be noticed in the sequel.

The only other fact stated by Mr. Bonnel, which as it is stated at large by him, and seems therefore to have had some influence on his opinion, and as it occurred within a very short time after the will was made, on the same day, we will examine somewhat in detail. After the testator had gone from the store with the will, and been absent ten or fifteen minutes, he returned, bringing with him a bond and mortgage, and requested Mr. Stryker to calculate the interest. When done, Mr. Maxwell abated fifty dollars of the amount, and the balance was paid to him by the obligor, Peter I. Case. The witness considered the money safe, and thinking the testator ought not to have made the discount, asked him why he would throw so much away. He answered, he had promised the man to do so for the sake of getting the money.

Some farther facts in relation to this transaction were stated by the obligor on his examination. He was a weaver by trade, had some personal estate, but no other real estate than that included in the mortgage, which was not worth the amount due

on the bond, then three hundred dollars, with the interest for nearly one year. The testator called on him for payment, and was told he would have to take the land. After some conversation he agreed to relinquish fifty dollars for the sake of payment. In a few days, Case called on him and asked him if he would do as he had said, without mentioning the sum. The testator remarked that he could not, it was too much. Case then told him he would have to take the land, and got up and walked towards the door. The testator desired him to stop, he would allow the fifty dollars; and procured the bond and mortgage, and they went together to the store of Mr. Stryker.

On this transaction it may be remarked, that we see the testator, on the very day the will was made, managing, directing and controling his own affairs; and to guide us in judging whether it was discreet to relinquish so large a sum, we are to recollect, that when he withdrew from business he had converted his landed estate into personalty, for more convenient management; that he had recently been compelled, at very considerable loss, to take a farm, and a house and lot in the village, which had been mortgaged to him; and that the land held by Case was unequal to the amount of the debt charged upon it. If, too, he then wanted money badly, as he told Mr. Bonnel, his conduct does not appear unreasonable. The conclusion forces itself on our minds, that no one of those who were apprised of the transaction regarded him as an imbecile, childish old man, incapable of managing his affairs. Even if interest would have led Mr. Case, which there seems no ground to suspect, to take advantage of his infirmities, can we believe that Mr. Bonnel and Mr. Stryker would not have cautioned him against the glaring impropriety of treating with a man whose mind and memory were not sound? Would they not have protected their neighbor and friend from imposition? Would they have become accomplices in the fraud, by suffering it to be perpetrated in their presence, without objection or rebuke? Persuaded as we are, they both were honest and honorable and independent men, we can account for their conduct only by the conviction, that they believed

him capable of managing his concerns, and disposing of his property, and felt that, even if he yielded more than they would have done under like circumstances, they were not at liberty to interfere.

These are all the facts stated by Mr. Bonnel, which can serve as grounds for the opinion as expressed, of the incapacity of the testator, and which, in our judgment, they do by no means serve to sustain. And we cannot omit again to advert to the inconsistency which forces itself upon us, between the opinion he expressed on his examination, and the certificate he gave by attesting the will, as every attesting witness does give, that he then believed the testator competent to make it.

We have thus reviewed the testimony of the subscribing witnesses; and the result on our minds is, that the weight of evidence, as well from the opinions of these witnesses, as from the facts they state, is decidedly in favor of the capacity of the testator at the execution of the will.

We now proceed to the other witnesses. And we propose, in the first place, to look into the evidence produced on the part of the caveators; for on them rests the burthen of proving the incompetency of the testator. The truth of this position we heard called into question on the argument with some surprise, for we had supposed it to have been so long, so firmly and so universally settled as to have assumed the character of an axiom, or element, or fixed principle, that whenever the formal execution of a will is duly proved, he who wishes to impeach it on the ground of incompetency, must support by proof the allegation he makes, and thereby overcome the presumption which the law raises of the sanity of the testator.

Let us, however, pause a moment to examine this point. In the case of *Den* v. *Johnson*, in the supreme court, the doctrine is laid down in these words: "After probate, the sanity of the testator was always to be presumed in favor of the will—the insanity always to be proved by him that alleges it." By the words "after probate," we are, we suppose, to understand, after proof of the formal execution. In *Den* v. *Vancleve*, judge

Washington laid down the rule in broader terms: "The presumption of law always is in favor of sanity at the time the will was executed, and the burden of proof lies upon the person who asserts unsoundness of mind." In that case the will in question had not been exhibited in the orphans' court. In *Harrison* v. *Rowan*, 3 *Wash.* 584, judge Washington charged the jury that "the question was whether John Sinnickson made a valid will of his real estate; that the plaintiff held the affirmative; and that all he had to do was to satisfy them that the will was executed in due form." In this case the will had actually been repudiated in the orphans' court. In delivering the opinion of the supreme court of New-York, in *Jackson* v. *Vandusen*, 5 *John.* 158, judge Vanness says, In all cases where the act of a party is sought to be avoided on the ground of his mental imbecility, the proof of the fact lies upon him who alleges it, and until the contrary appears, sanity is to be presumed. He says not only that this is the rule, but that independently of authority, it ought to be so, and that it is recognized in all the elementary writers and in all the adjudged cases he had met with both in law and equity. To the numerous authorities he quotes may be added a train of cases to the same effect in the American courts. We forbear to enlarge. The objection, although unsound, could not be passed without respectful attention.

The advanced age of the testator, upwards of eighty years, was made on the argument a distinct point against the will, not indeed as rendering him legally incapable, so much as raising a presumption of incompetency. The power of making a valid will is not impaired by the access of old age, nor is it denied to him who has attained the utmost verge of human life, on that account alone. Three-score years and ten do not always, or necessarily, extinguish the light of intellect. It is then, in some men, more brilliant than it is in others at a much earlier age. The power of disposing of property is an inestimable privilege of the old. It frequently commands attention and respect, when other motives have ceased to influence. How often, without it, would the hoary head be neglected, deserted and despised.

Chancellor Kent sustained the will of a man between ninety and a hundred years. He properly said, "The law looks only to the competency of the understanding, and neither age, nor sickness, nor extreme distress or debility of body, will affect the capacity to make a will, if sufficient intelligence remains;" and he cited with approbation the commentary of Voet on the Pandects. *Licet enim non sani tantum, sed et in agone mortis positi, seminece ac balbutiente lingua voluntatem promentes, recta testamenta condant, si modo mente adhuc valeant.* 5 *John. Chan. R.* 158.

The first witness examined on the part of the caveators, was Dr. Stewart Kennedy, a grand-son of the sister of the testator. The fact he states is, that on one occasion, in the spring of the year eighteen hundred and twenty-three, he was not recognized by the testator, and the latter mistook the connection between them. "I called on him," says the witness, "at his house, spoke to him, and he did not know me. Mrs. Maxwell knew me, and told him who I was; he then appeared pleased to see me." After a little while the testator introduced the witness to a gentleman as Dr. Kennedy, his grand-son. Mrs. Maxwell said, not his grand-son, but his sister's grand-son. He sat a little, as if thinking, and said, well, maybe it is so.

The whole circumstance was neither unusual among elderly people, nor remarkable. The witness was, as he says, quite a boy when the testator removed from the vicinity of his father's residence in Warren, and had grown up to manhood, seeing the testator but once or twice a year. He had seen him but once in the year before. The other occurrences of the visit seem to us greatly to outweigh the mistake, and should, we think, have removed from the mind of the witness all unfavorable impressions. Mr. Maxwell not only manifested his gratification at seeing him, but inquired after his father and mother and other friends in Warren; and his inquiries and questions relative to the family and his friends were, as the witness says, pertinent and correct. Was not here mind, memory, an attention to the courtesies of life and to the duties of kindred and affection?

William Kennedy, esquire, was the nephew of the testator, and intimately acquainted with him until his removal to Flemington; after which he saw the testator once or twice a year, mostly when he made visits to Easton, where Mr. Kennedy for some time resided. He considered that he could discover for some years a falling off in the testator's recollection, very much. He had not had much business with him in that time, but thought he could discover a failing in his recollection and mind, in his recollection very much. He speaks of but one transaction of business in which he saw the testator engaged, either with himself or others. In the year eighteen hundred and twenty-one or eighteen hundred and twenty-two, the testator placed a bond in his hands for collection at Easton. After it was collected, the testator visited him, received the money, and signed a receipt in his docket. In settling it with the testator, he says he was rather induced to believe that he was not capable of making calculations. For what reason, he does not state. He made no attempt and failure. The witness gave him "a statement of the times of payment, and of the amount, in order that he might show it to his family," and he did so "because he did not think him capable of entering into long calculations about money and property." But not a single fact is stated by the witness whereby the capacity of the testator was tested. The witness thought he did not attempt to examine the account, and this is by no means an unusual occurrence, as experience will bring to the recollection of every one accustomed to business. The testator reposed confidence, as he had good reason to do, in the integrity and accuracy of Mr. Kennedy, and he did not, therefore, revise the statement, at least not in his presence. The truth, however, stands uncontroverted, that the testator in this instance actually did transact his own business, and no fact is related bringing into doubt his capacity to do so.

Another occurrence is related by this witness. In the year eighteen hundred and twenty-two or eighteen hundred and twenty-three, the testator visited him in Easton, and, so far as we are informed, unaccompanied by any of his family. He expressed

a wish to call on an old acquaintance residing in the town, whither the witness went with him, and there left him, having obtained his promise to return, and being told, in answer to an inquiry whether he could find the way back, that he knew every part of the town before the witness was born. Not returning as soon as the meal occurred of which he was to partake, Mr. Kennedy went in search, and found him coming from towards the Lehigh bridge, whither, crossing the main street he had gone in a southerly instead of an easterly course to the residence of the witness. "Where, uncle, have you been," said he. "Really," replied Mr. Maxwell, "I was lost." And in all this we perceive no extraordinary transaction. There was a mistake. He may have gone wrong from inattention, or there may have been a failure of memory; and had he been found wandering and persisting in error, a more unfavorable inference might have been just. But he had himself discovered his error, and was actually retracing his steps.

On the score of opinion, Mr. Kennedy says, he should have been sorry to see him, at that time, undertake to make a bargain; yet he adds, "I do not say that he was not fit to make a bargain; he might have made a bargain careful and close enough for any thing that I know." Farther, he says, "I am not able at present to recollect of any particular expression or sentiment that would lead me to believe that he had lost his mind, although my impression was that his mind had failed. Speaking of ancient things, his memory appeared to be good, and of recent transactions, his memory appeared to be wavering. In speaking of the revolutionary war, and things that transpired then, I think his memory was better than mine." "In all the conversations I had with him, he appeared to be sensible of his obligations to his kindred by ties of blood."

Dr. John Manners had been acquainted with the testator for about fifteen years, and thought he could discover a gradual declension of his mental and bodily powers. For several years before his death he did not consider him capable of transacting business of any considerable importance. In the month of Au-

gust, eighteen hundred and twenty-five, from the impressions he had of the testator, he should not think he had capacity sufficient to dispose by will of a large property with discretion and proper regard to the interests of his own family; yet he says, "I can't say whether he was competent at that time to make a sale and transfer of land or not: he might. I don't think he was capable of making a transfer of all his property by will or deed; a simple sale I think he might probably have been capable of making, but I do not think him capable of transacting business that required any very complicated operation." Moreover, the doctor says in express terms, "I can give no specific instance of mental imbecility," and that he thought he had capacity enough to feel the force of natural affection towards those of his family about him. He recollected no foolish or childish expression of the testator, nor any one particular expression or sentiment uttered by him, showing at any time a want of mind, nor did he recollect, in his intercourse with the testator, any act of that character, except his forgetting the witness might be one. The latter, indeed, is the only matter of fact on the subject of capacity related by the witness. "In one instance, in particular, I recollect he did not know me." The circumstances are not detailed, wherefrom we might have better appreciated its weight; nor the time; but it was doubtless after he removed from Flemington, when, although he called on the testator once or twice, he had not frequent opportunities to see him. And such a casual want of recognition, by a very aged man, of a person whom he seldom saw, and with whom, as the witness himself says, he was not very intimately acquainted, more especially when we bear in mind that the eye-sight of the testator was then in some degree impaired, is very far from being a decisive proof of mental imbecility.

An habitual inability to recognize his neighbors and acquaintances, would be strong evidence of a sunken intellect; but a few occasional instances of this kind, may show in an old man a memory weakened, but not destroyed—impaired, but not extinguished. "The failure of memory," says chancellor Kent, "is

not sufficient, unless it be quite total, or extend to his immediate family and property. The want of recollection of names, is one of the earliest symptoms of a decay of the memory; but this failure may exist to a very great degree, and yet the solid power of understanding remain."

In the case of *Vancleve's will*, some strong facts of this kind were proved on the trial, in the circuit court of the United States. He would ask foolish questions, and inquire the names of his former acquaintances who called to see him. Upon one occasion he inquired how a particular acquaintance was, and being answered that he was dead, he not long afterwards expressed a wish to see him. At one time he mistook one of his nieces for a grand-daughter who had long before been dead. Many similar instances of a great decay in his memory were stated; yet the verdict of the jury in this case, which sustained the will, was satisfactory to the court.

Samuel Griggs was a neighbor of the testator, and had known him for fifteen years. He thought he had not mind and capacity enough to make a will in the year eighteen hundred and twenty-five. "My opinion," says the witness, "is founded upon his forgetfulness in dealings I had with him, and in counting money. He could not count thirty dollars before he would get bewildered." And he stated all the instances of forgetfulness and incapacity he recollected.

The witness was indebted to the testator in a bond of two thousand dollars, on which for a number of years he paid the interest. In eighteen hundred and twenty-three he paid one hundred and forty dollars. The testator could not count it. His wife took it and counted it for him. The testator said his mind was all gone, and could not do any thing any more. In eighteen hundred and twenty-four he paid him the like sum. The testator started then to count it, but could not, and his wife had to count it for him. Yet we find here the testator engaged in the transaction of business, and moreover, on these occasions he actually wrote receipts for these moneys on the bond which he held against Mr. Griggs.

The following is one of the instances of forgetfulness. In May, eighteen hundred and twenty-five, the testator sent five hundred dollars by the witness, to loan out in Sussex on bond and mortgage; for which, when he took the money, he gave a receipt. On his return, he handed the testator the bond and mortgage, and asked for the receipt. The testator appeared to have forgotten that it had been given, and the witness had a great deal of difficulty to make him sensible of it; but it was found and returned to him.

Here was, indeed, a failure of memory; but let us look at the rest of the transaction. The testator spoke to the witness to carry the money for him; told him that Mr. Clark had got a place for it; informed him who the borrower was, where he lived, and that Mr. Clark had told him the property was safe for the money, and directed him to get the bond and mortgage drawn. When the witness returned, the testator recollected having given him the money, and asked him if he had got the mortgage recorded. Here we see the testator not only in the actual management and direction of his pecuniary affairs, but doing so with prudence and circumspection, nor did he overlook the propriety of recording the mortgage.

The other occurrence stated by the witness relates to the payment of the bond from him to the testator, already mentioned. In the latter part of February or the first of March, eighteen hundred and twenty-five, he proposed to pay off this bond. It was a good while before the testator consented to take the money, to which, after a good deal of persuasion, he yielded. Mr. Griggs told him he ought to take interest at six per cent, but he would take no less than seven. The reason he gave for not taking the money, was, as he said, that he did not want it, that it was not due and the witness could not make him take it. It had been due, the witness said, four or five years. After he had concluded to take it, he requested Mr. Stryker, in whose store they were, to go with them to the house and count the money. Bank notes were offered; he said he did not know whether the notes would pass or not, which Griggs then told him he would gua-

rantee. His hand trembled considerably, said the witness, in consequence of which it would have been difficult for him to count the money, and more than that, he would forget and make mistakes. Stryker counted the money, and handed it to him. He put it up, and did not count, or attempt to count it.

We are at a loss, in all this statement, to find the proof of incompetency. He actually did transact, and was suffered by his family and friends to transact his own business to a large amount. Was it in his pertinacious adherence to seven per cent, which he knew he could legally claim? Was it in his reluctance to receive money which was advantageously placed out in the hands of an honest, punctual and able man? Was it in his wariness of bank notes, among the multitude of counterfeits and broken banks, from the latter of which he had recently suffered? Was it in his requesting an experienced and sagacious man of business to examine and count them for him? Was it that he did not count them after that had been done by one in whose care and accuracy he confided, from having frequently tried them—a circumstance which few of us have not witnessed? Was it that he said the money was not due?—an observation readily explained by the fact stated by Mr. Griggs, that the interest on the bond was payable on the first of May, until which time he may have supposed he could not be compelled to receive it; by no means an uncommon error.

Joseph West became acquainted with the testator in February, eighteen hundred and twenty-three, and then rented from him a farm called the Swamp farm, situated in Amwell, and continued his tenant until his decease. He stated, that from his acquaintance with the testator up to August, eighteen hundred and twenty-five, he thought him not capable at that time of doing his own business, and of making a will disposing of his property among his family. We shall briefly advert to the material facts which he states, and on which his opinion was founded. The testator frequently did not know him when he met him in the street, or elsewhere saw him. Their acquaintance commenced in eighteen hundred and twenty-three, a little more than two

years before the will was executed. And the witness says the testator would know him when told who he was.

In making their annual settlements for the rent, which was paid partly in wood and other articles, usually leaving a balance to be paid in money, the testator did not make settlement for himself, but with the aid generally of Mr. Stryker; seldom, if ever, looked over the accounts, and never counted the money. Let us look at one of these occurrences; and we may take that of the second year, eighteen hundred and twenty-five, in the spring before the will was made. "I went to the testator," says the witness, "when I went to settle the second year's rent, and told him I had come to settle with him. He told me he could not do business as he used to do. I told him we would go to Mr. Stryker's, and we went. [Mark, by the way, West proposed to go to Stryker's.] I handed Mr. Stryker my book, and he went over the account and reckoned it up, and I paid the remainder in money. I don't recollect that the testator looked over my account, and I think that he did not. I handed the money to Mr. Stryker, and he counted it. I got a receipt: Mr. Stryker wrote it and read it to him. Testator did not read it. Testator took no further part in the settlement than merely to sign the receipt." And it may be asked, What further part did Mr. West take than to hand his money to Mr. Stryker? "He appeared to put his dependence pretty much in Mr. Stryker. When Mr. Stryker made a settlement for us, he read my account over to the testator."

Is there any thing remarkable in this narrative? Was it extraordinary he should accept, or even seek, the aid of Mr. Stryker? Or that he did not cast up the account after it was done by an experienced accountant in his presence? Or that he did not look over the account, or count the money, when the one was read to him, and the other counted, by Mr. Stryker? But did the testator understand all this? "I think," says the witness, "he noticed and understood what was going on."

Let us look a little farther at this affair. In the year eighteen hundred and twenty-three the contract for the farm was made,

the terms agreed on, and the price fixed between them; the testator acting for himself. "Towards the close of every year I would ask him," says the witness, "whether he was going to let me stay on the farm." "The second year [this was the year of the will, eighteen hundred and twenty-five] he told me that people said I was doing so well, and making out so well, that he would have to raise the rent on me. This was the only reason he gave. I told him that the place had been improved by me, that I had done a great deal of hard work on it, and that if he did raise the rent I should leave the place." In eighteen hundred and twenty-six and eighteen hundred and twenty-seven, the testator insisted that West should pay more rent. "He would try for a while if I would not give more, and then would say, I do not want to be hard with you, and would let me stay on the old terms." These were the years after the will was made. There seems nothing here to justify the opinion of the witness.

On one occasion, during the first year, Mr. Maxwell went to the farm, which he said was the first time he had been upon it; for it seems he had been compelled to take it at a loss for a debt due him. He came out into the field where West was; gave him no instructions respecting the farm, and took no apparent interest in it; which he thought strange. His advanced age, and the manner in which he became the owner of the farm, may serve in some degree to account for it; he may have made few remarks, and yet have been very close in his observation. Instructions were, perhaps, unnecessary, as it was under lease, and in progress of improvement; and he, perhaps, made inquiries of others, if not of the witness, as we have found him relating what other people told him.

One of the reasons this witness expressly assigns for his opinion that the mind of the testator was growing weak, is an occurrence in respect to some wood. He was bound by his contract to deliver the testator a quantity of cord-wood from the place. The testator found a good deal of fault with the wood he brought, and scolded. On one occasion he said it was green and would not burn. It was so; but West said he could not help that.

West got out of humor, and told him the man who had lived on the place before had said there was no getting along with him, and it was like to turn out so. Mr. Maxwell said, he had never been unreasonable, and after that seemed in a better humor. Now Mr. West may have thought such complaints on the part of his landlord quite misplaced; but we know that they are by no means uncommon, and oftentimes very just, when the tenant pays his rent in kind.

The old lady, Mrs. Maxwell, used sometimes to tell him the testator was cross and pettish, and not to mind him; and once, a young woman living in the family told him the like in the testator's presence. And all this may have been said, and it is not uncommon, in order to soothe some irritated feeling in the witness.

John Dilts, on one occasion, coming out of the door of George Rea, esquire, in Flemington, saw the testator feeling along the lower part of Mr. Rea's door-yard fence, for a gate. The testator said, folks are altering their ways and gates so often that I can't find them always, and asked the witness to show him the gate to go in there. The witness helped him through the gate, and the testator said he was old and forgetful, and could not find the way. He mentioned his business there."

Mr. Rea, on his examination, relates the occurrence in substantially the same manner as this witness, and fixes the time at least a year before the date of the will. A new fence and gate had been put up, and in the place of the former, but of a different kind of pales. He mentioned to Mr. Rea his business, which related to a suit he had a short time before instituted before Mr. Rea as a justice. Mr. Rea testifies that what was said by the testator while there at that time, was sensible and to the purpose, though but little. Dilts said, when he first saw him he appeared to be bewildered and lost, as he thought. Mr. Rea said, he seemed to be quite weak and feeble, but could not say whether he seemed bewildered or not. Mr. Rea had known him for many years, but for several years had seldom seen him to converse with him. The testator was sometimes before him on business

as a justice. He mentions one occasion, a short time before the incident stated by Dilts. He talked then but little; his son, a lawyer, was with him. Nothing amiss at that time appears. Mr. Rea mentions an instance when the testator did not recognize him, but as from what he says of the time it may have been after the will, we need not notice it.

George Henry thought he could perceive, in the last few years, a failure in the testator's mind and memory. After the summer of eighteen hundred and twenty-five, the testator would sometimes not know him, and said his eye-sight and memory failed him. The witness thought the testator was not, in August, eighteen hundred and twenty-five, competent to transact his own business generally, and hardly thought he had sufficiently strong mind and memory to dispose of a large real and personal estate by last will and testament. This, he said, was his decided opinion. He states the instance, and says it is the only one in regard to business, on which he founded his opinion as to the testator's incapacity. It relates to the recording of a lease, in April, eighteen hundred and twenty-five, in the clerk's office, where the witness was employed; and there seems to be little more in it than that Mr. Maxwell thought, and perhaps justly, that other persons, and not he, should pay the office fees. He carried it there himself, once inquired whether it was done, and afterwards, being told in the street or the store that if he called he could have it, he did so. The witness says he does not think the testator, during the last five or six years, was able to hold a connected conversation of any length on any subject. Yet he says the remarks of the testator, in answer to his remarks, were like the remarks of ordinary men under like circumstances, quite rational; and he does not recollect whether, from any conversation, he discovered whether he could hold a connected conversation or not. Farther, he says his opinion arises, in part, from the absence of mind of the testator. He would speak of many things in succession which had no connection; yet he says his remarks would be shrewd too, and all point to one object. His remarks were whimsical, though to the pur-

pose. This witness did not recollect any particular conversation with him in which he exhibited imbecility of mind. He did not think it would have been safe to trust the testator to manage his business, in August, eighteen hundred and twenty-five; yet he did not know whether the testator had or had not mind and memory enough to make bargains with a proper regard to his own interest. He did not think it would have been safe to trust the testator then to make a bargain to buy or sell property of any serious amount, without the advice of others; yet he could buy marketing, and necessaries for his family. And the witness could not say his knowledge of men and things was then very imperfect, although it became so afterwards. One reason, the witness says, and it seems to have considerable influence with him for thinking the testator's mind impaired, was, that he asked so much, three thousand dollars, for his swamp farm. Now he says he heard this price, not from the testator, but from Mr. West. And here is obviously some mistake, for the latter says the testator uniformly set the price at two thousand dollars.

Mary Mullener lived in the family of the testator four or five years, extending both before and after the will was made. He did not always know his grand-children, Mrs. Sherrerd's children, when they came there; but whether this was before or after the will she has not stated. When told their names, he appeared to recollect them. With respect to her wages he did not make a miscalculation of the amount, but adopted a mode of calculation, and not perhaps an unnatural one, which he abandoned, when an impartial person told him he thought another mode the correct one. She expresses an opinion qualifiedly. "I do not think he was able to manage all his own business while I lived there." And afterwards said, "I don't know what part of his business he was or was not capable to manage himself." Towards the latter part of the time, but whether before or after the will is not stated, some one was generally called in to assist him when business was to be done. She did not recollect any particular act or thing he said or did while she lived there, that evinced to her he was childish. He had family worship, and as we

may infer, all the time she lived there. In his prayers he would repeat over the same things often.

George Forker underwent a very long examination, and many things he has stated are of little importance. They relate, chiefly, to work done by him as a carpenter in the repair of a house for the testator, about which a controversy arose between them; whether a sum, admitted by the witness to have been fixed at the outset, was to pay for the whole, or whether extra. work was afterwards agreed to be done and paid for. He seems to have wished to have as little as possible done by way of repairs, while the carpenter proposed, either from himself or on the suggestion of the tenant, many things more. They at length fell into a dispute. The whole occurrence is not an unnatural, and perhaps not an uncommon one. Mr. Maxwell seems to have been close, and in some instances forgetful of what he had consented to do; although, perhaps, if he had to tell the story he might give these as instances of the failure of the carpenter's memory. The moral of Æsop's fable of the statue of the man bestride of the lion, should never be forgotten.

The witness being asked whether he considered the testator in August, eighteen hundred and twenty-five, to possess sufficient mind and memory to dispose of a large real and personal estate by will, answered, that he did not think the testator had at the time they commenced dealings, in the preceding month of April. Yet he made a contract with the witness for the repairs of the house afterwards, and, as the witness says, made a subsequent contract for additional repairs; himself decided and directed throughout what repairs should be done, and they were considerable, his charge for work amounting to one hundred and forty dollars; and upon their difference, they mutually agreed to a reference, by a written instrument, and the testator himself attended and managed his cause before the referees.

Thomas Stout moved to Flemington in the year eighteen hundred and twenty-three, when his acquaintance with the testator commenced. He was a blacksmith, and was employed by the testator. When he moved, he thought the testator childish,

and saw a failure afterwards. He saw instances of his conduct whereby he formed his opinion. And yet we think the instances he states, with, however, some exceptions, are not very striking or conclusive. When the testator came into his shop, and other persons were there, "he would seem not to know where to go to find the witness." And this is not remarkable, if, as is represented, his eye-sight had somewhat failed, especially as the acquaintance between them was recent. The witness relates a circumstance, before the will, of the testator taking the wrong way for his return from the shop; and some instances are mentioned by him and other witnesses, without fixing the time, of his appearing bewildered or lost in the street. These are, doubtless, unfavorable tokens; but they seem to have been occasional and temporary, not permanent, and may have been in a greater or less degree induced by feebleness of body, and occasional dizziness, to which old age is subject. The witness frequently conversed with him. The testator dwelt much upon revolutionary stories, and "generally repeated the same story a time or two at the same sitting;"—a mark of failure of memory unquestionably, but not uncommon. He had to be made acquainted with the witness when he called at his house. Yet he does not seem to have been thus at a loss when he went to the shop; for he went there frequently to have jobs of work done, went alone, and in all instances seems to have acted unexceptionably in this respect, never forgetting, as the witness says, the job that was to be done. Once, indeed, he took an article to be repaired which did not need it. Sometimes he had a difficulty, and even made mistakes, in selecting money from his pocket to pay small sums for work, and how far owing to his defect of vision we cannot exactly determine; an occurrence, however, not uncommon among old persons. The witness says he does not know that he ever heard the testator make a childish remark, or one altogether void of meaning; has heard him make a remark partly void of meaning; and the instance he gives is, that he remarked he was poor, and the jobs were very highly charged for. Is either of these an extraordinary occurrence? Are they

not often made as little more than words of course? This witness states a circumstance which we need not repeat, as our allusion to it would be readily understood, which betokens a forgetfulness or disregard of propriety of demeanor and self-respect, and of respect for others, which is among the strongest of the proofs of incapacity the caveators have adduced. The witness thinks he observed it soon after he moved to Flemington, which was in April, eighteen hundred and twenty-three. We have no disposition, nor indeed any right from the evidence, to call in question the veracity of this witness, but have our surprise excited that no other witness has mentioned a matter said to have taken place so frequently and so publicly, and to have been by the witness himself pointed out to other persons. Yet it is entitled to be duly weighed in estimating the capacity of the testator.

John Atkinson became acquainted with the testator in the year eighteen hundred and twenty-three. He relates some circumstances which show a failure of memory in the testator. In one instance, he mistook the witness for another man, and spoke to him as such, and was not readily convinced of his error. There are, however, some facts connected with it, which render it less remarkable; and his conversation, the witness says, was connected and consistent, and as any other person would have talked upon a like subject if the man had been right. In the conversation about the lot, in May, eighteen hundred and twenty-five, the part borne by the testator was connected and consistent, and the witness would not have thought strange if he had not been mistaken about the lines. His estimate of the value of the lot being considerably higher than the opinion of the witness, is a very equivocal mark. The witness had seen him lost in the street, and shown him the way home, but whether before or after August, eighteen hundred and twenty-five, he could not say. Some of the instances of failure mentioned by this witness were subsequent to the will, and from them much of the strength of his opinion of the testator may have resulted, more especially as he says his mind does not serve him as to dates. Once, in the

summer of eighteen hundred and twenty-five, on a Sunday, just after public worship, he saw some persons who said the testator was lost, and afterwards saw them returning with him. The inquiries made by the testator respecting the recess in the building in progress of erection for a Methodist church, and the room beneath it, were not extraordinary, as they were made by many others; and the belief of the testator, in the explanation of the latter, so seriously given by Mr. Bonnel, is very equivocal proof.

Two witnesses called by the caveators, as well as one on the part of the probate, speak of the conduct of the testator on the fourth of July, eighteen hundred and twenty-five, when he bore a part in the public exercises of the day, in the character of a revolutionary soldier. He walked in the procession, bearing a copy of the Declaration of Independence, which, on the stage, he delivered, with a few remarks, to the person appointed to read it. Before any inquiry as to his demeanor on that occasion, it will occur, we think, to any one as singular, that his neighbors should select and intrust drivelling old age, or second childhood, for such a duty. George Maxwell, esquire, the surrogate of the county, called by the caveators, relates the transaction. He says, "The old man's speech made a strong impression on his mind. He was pleased with the manner in which the testator delivered it, and had heard people afterwards say they thought he had done extremely well." Even if previously drilled for the speech, it is manifest memory had not entirely yielded up her powers.

The custom of the testator to resort to some store-keeper, lawyer, or other man of business, to make calculations of interest for him, was pressed with some earnestness by the counsel on the argument. Some of the witnesses think he was not equal to the operation himself, and others think he could have calculated for sums or periods simple and without fractions. But we recollect no instance given of his attempt and failure, and these opinions therefore have, we think, little but conjecture to sustain them, and were very probably induced by the custom referred to. When he wanted the calculations, we find him always resort to an apt instrument. He did not go to the pump-handle, or the

horse-block. The value of this custom, in its bearing on the subject before us, may be estimated from the fact stated by Mr. Bonnel, that the testator was in the habit of calling upon him and David Shrope to make calculations of interest for him, as early as eighteen hundred and eighteen, when no one has ventured to doubt his capacity to transact business and make a will.

After this review of the testimony on the part of the caveat, in which, without attempting to recapitulate the whole, or to enter at all times into minute detail, although perhaps enough so to become wearisome to those whose interest may induce them to read it, we have endeavored to exhibit and consider the most prominent points; it is our purpose now briefly to examine the evidence produced in support of the will.

At the outset it deserves, we think, to be remarked, not only that the execution of the will, as already mentioned, was the act of the testator alone, without the interference of any other person, but that the design to make a will, and its contents and provisions, were of the mere motion of the testator, and without persuasion, entreaty or advice, so far as we are informed by the testimony. No fraud is proved, nor do we recollect that the proof was attempted or the charge ever made, directly or indirectly, upon the argument.

One of the most sure, satisfactory and convincing methods of ascertaining the strength of intellect, is to see it in action—to judge of its ability to perform by its actual performance. This test is used in natural philosophy and mechanics, as well as in the science of the mind.

Andrew Vanfleet borrowed money in May and October, eighteen hundred and twenty-five. At the former time he made the contract with the testator personally and alone. The latter sum was three hundred dollars, which was counted out by the testator. When he applied for this loan, Mr. Maxwell told him he could have it if he would give bond and mortgage, but afterwards consented to make the loan on personal security, which on inquiry he found satisfactory. When the witness called for

the money, the testator went himself out of the room—Mrs. Maxwell remaining there—brought it with him in bank notes, and counted it aloud without difficulty, the witness looking over the money at the time. In eighteen hundred and twenty-six he paid the testator the interest, which was counted by him. The same took place in the spring of eighteen hundred and twenty-seven. The witness first observed a failure of memory in October, eighteen hundred and twenty-seven; and he relates an instance, but which, from the period of its occurrence, two years after the will was made, needs not to be further noticed.

Elisha R. Johnson borrowed three hundred dollars of the testator in the spring of eighteen hundred and twenty-six. He made application to him personally in the first place, to know if he could have the money at a given day if he wanted it. Before that day, and after the lapse of about two weeks, the testator called to know if he would certainly take it. The witness paid him interest in the spring of eighteen hundred and twenty-seven, and thinks he counted it. In the spring of eighteen hundred and twenty-seven, the witness settled a note with him which he held against the Presbyterian church in Flemington. The conversation on the part of the testator was rational and appropriate. The witness said he transacted these matters with the testator on the presumption he was competent, otherwise he would not have done it, and nothing occurred to encounter the presumption. His questions and answers were pertinent. His mind and memory appeared to have failed in some degree, which the witness considered nothing more than the failure incident to old age.

Rev. Charles Bartolet borrowed money of him in eighteen hundred and twenty-three or eighteen hundred and twenty-four, paid him the interest in the spring of eighteen hundred and twenty-five and eighteen hundred and twenty-six, and then considered him capable of understanding and transacting business.

John T. Blackwell lived in the same village with him for seventeen or eighteen years, and had frequent conversations with him. Up to August, eighteen hundred and twenty-five, he had not discovered, to his recollection, any thing to induce him to

believe there was a change in his mental capacity. During this period the witness was clerk of the county. Testator had mortgages recorded before and after eighteen hundred and twenty-five, which he pretty generally brought himself to the office.

Paul Kuhl, junior, borrowed money, one hundred dollars, of the testator, in the fall of eighteen hundred and twenty-six. He applied to the testator himself. The testator proposed to go to Stryker's store and have a note drawn: when arrived there he mentioned he wanted a note drawn for one hundred dollars.

In the spring of eighteen hundred and twenty-five he made a loan of money to John Barton, esquire. Being applied to for the loan, he was particular and minute in his inquiries respecting this person, with whom he was unacquainted. He inquired whether he was a good man, and what security he could give. Being told a mortgage; where the land lay? what the value of it? whether incumbered? directed a search to be made at the clerk's office, and a certificate from there being produced, said he was satisfied.

In the fall of eighteen hundred and twenty-five, he was applied to for a loan of money to Runkle Rea. He made reasonable and apt inquiries, and agreed to the loan. And soon after the application was made, as Theodore Ellis was passing the door where the testator was sitting, the testator spoke to him on the subject; told him he understood the witness and Rea were going into business; inquired where, and what business; inquired whether the money could be used to good advantage. Ellis explained, and the testator said he would let Runkle have it. This occurrence was about a month after the execution of the will.

In October, eighteen hundred and twenty-five, he was applied to for money by Andrew Vanfleet; made the proper inquiries as to the security, and did not agree to lend until he received satisfactory information from a suitable person.

In the summer of eighteen hundred and twenty-five, he consulted his attorney respecting a mortgage given by one Rake, which he held by assignment, and on which was an arrearage

of interest. He said there was some difficulty on account of a life estate in the land, said to belong to an old lady. Inquiry having been made by his attorney, he was advised to take no legal proceeding until her death. Several times afterwards he inquired of his own accord of his attorney, the last time in the spring or summer of eighteen hundred and twenty-seven, whether she was living or dead.

In the spring of eighteen hundred and twenty-six, he loaned eight hundred dollars to Joseph Bartles, on personal security. He first inquired if the persons offered were good, and being satisfied on that head, agreed to make the loan.

In the same spring he loaned six hundred dollars to Asa Jones. Elijah Wilson was offered as security. The testator inquired the situation of Jones, and being told Wilson was a good man, then said he could have the money.

In the same spring he made a loan to Isaac Jarvis of one hundred and fifty dollars. Elijah Wilson being again offered as security, the testator remarked, he was almost too free in lending his name.

In the summer of eighteen hundred and twenty-six he loaned Joseph Schenck two hundred dollars, on bond and warrant. The testator handed them to his attorney, with directions to enter up judgment, which was a condition of the loan. In eighteen hundred and twenty-seven the testator went to his attorney, told him Schenck had paid a year's interest, and directed him to indorse it to his credit.

In eighteen hundred and twenty-six, being applied to for a loan, he declined it at first, and afterwards made it on good security. He gave an apt reason for declining it.

In eighteen hundred and twenty-six, he inquired of his attorney whether he sometimes went into Warren county, and finding he did, directed him to call for some interest due him there, which was accordingly procured.

In the spring of eighteen hundred and twenty-seven, a person applied to him to let him have one hundred dollars, on the assignment of a bond and mortgage, which he represented good.

The testator said, if so, the assignor could have no objection to being security on it; which was done accordingly.

In the summer or fall of eighteen hundred and twenty-six, he was desirous to have a release from his son's wife, of dower in a lot he had obtained from the son. The reason he gave was, that she had not signed the deed, and if he was to die it would be subject to her dower.

In most of these loans, Mr. Bartles, the attorney employed by Mr. Maxwell, was present at the delivery of the money and the execution of the writings. But he appears, from the evidence, to have done little if any thing more than is common for a scrivener, except in protecting the testator from broken banks and counterfeit notes, and in communicating information to him respecting the solvency, or the goodness as it is called, of applicants for money.

In eighteen hundred and twenty-six, John H. Anderson, standing at the door of his store in the village, heard the testator in the street, dunning one William Case for money. Case promised to come to Flemington the ensuing Thursday, four or five days off, and pay it. He knew Case, for he went out and hailed him. On the day appointed the testator came to the store, asked whether Case had been there, and stated substantially what had passed between them. Anderson discovered no visible change in the mind or memory of the testator until eighteen hundred and twenty-six or eighteen hundred and twenty-seven.

James Callis was the clock-maker of the village, and repaired the testator's clock, at his request, in the spring of eighteen hundred and twenty-six. Having replaced it, the testator paid his charge, one dollar and twenty-five cents, taking the money from his pocket. Callis told him the clock was warranted for a year, and if any thing went wrong to let him know, and he would fix it without further expense. Several months afterwards Mr. Maxwell called and told him something was wrong in the striking. He went, found it as represented, and rectified it; and Mr. Maxwell said he believed the year was not up, and he supposed there would be nothing to pay. The witness first discovered a

failure in the testator in eighteen hundred and twenty-seven. The testator appeared always to know him, and generally mentioned his name. The testator was in the habit of attending church and religious meetings until about six months before his death.

In these facts, none of which are drawn from the testimony of Mr. Sloan or Mrs. Lummis, we see Mr. Maxwell not only in the direction and control of his affairs, the disposal of his property, the making of contracts, and the transaction of business, but we find him in the exercise of prudence, caution, judgment and memory; and what he did thus transact, and in this manner, we may, we think, safely conclude he was able to transact.

On the whole, although it cannot be denied there is strong evidence on the part of the caveat, yet on our minds the evidence in support of the will decidedly preponderates. A careful review of the whole evidence leads us to the belief that the testator was, at least, equal to the standard of testamentary capacity and competency which we have mentioned in the preliminary examination of the law on this subject. We are therefore of opinion that the decree of the orphans' court is erroneous, and ought to be reversed; and that a decree of the prerogative court should be made, admitting the instrument propounded to probate as a will of personal estate.

Most respectfully submitted to his excellency the governor and ordinary, by

CHARLES EWING,
GEORGE K. DRAKE.

A decree was made by the ordinary in conformity to the foregoing opinion.

JANUARY TERM, 1832.

JOHN ANDRESS v. PHILIP P. WELLER and JACOB MILLER.

It is not necessary that a man should be possessed of a mind naturally strong, or that the powers of his mind or memory should be wholly unimpaired, to enable him to make a valid will.

The opinion of Washington, justice, in the case of *Den* v. *Vancleve*, 4 *Wash.* 262, approved and adopted as prescribing the true standard of testamentary capacity.

When the testator's habits of intoxication are not such as to render him habitually incompetent for the transaction of business, it is necessary for the party setting up the incapacity of the testator on the ground of casual intoxication, to show its existence at the time of executing the will.

An omission made by a scrivener in preparing a will of real estate, cannot be supplied by parol evidence.

It seems that an omission made in preparing a will of personal estate, may be supplied, or a mistake corrected, by parol proof of the omission, aided by the written instructions to the scrivener, but not by parol evidence alone.

APPEAL from a decree of the orphans' court of the county of Warren, admitting to probate a paper writing purporting to be the last will and testament of Barnet Andress, deceased. The will was exhibited for probate by Philip P. Weller and Jacob Miller, named therein as executors. The caveat was filed by John Andress, one of the sons of the testator, who appealed from the decree.

Wall, for appellant.

Morris, for respondent.

THE ORDINARY. The testator resided for many years in what is now the county of Warren. On the sixteenth of December, eighteen hundred and twenty-six, he made and executed his last will and testament; and in the month of March, eighteen hundred and thirty, he died, without having revoked or in any wise altered the same. John Andress, one of the sons

of the testator, filed a caveat against proving the same. The matter came on to be heard before the orphans' court, and after full investigation, the will was admitted to probate. The caveator appealed from this decree; and the cause having been regularly brought up before this court, was submitted without argument.

The first question that arises under the appeal is, whether the testator was competent to execute a will. It is shown, that when the will was made he was about eighty years of age, and that his health had for some time before been rather declining, and also that his memory was less retentive than formerly. It appears, too, that he had no great strength of mind at any time, and that he was ignorant and unlearned, being able neither to read nor write.

On the part of the executors it is shown, that the testator, at the time of making the will, was in his ordinary mind, and of sufficient capacity to transact his ordinary business. He went voluntarily from his own dwelling to the house of William Wilson, esquire, for the purpose of having his will drawn. The distance is between three and four miles, and he went on foot in the month of December. He gave to Mr. Wilson the necessary instructions for drawing the will, and not being able to have it prepared on that day, he proceeded on and spent the night with one of his daughters. In the morning he returned, and in the course of the day the will was prepared for execution. It was then read to him twice, and afterwards executed in due form, in the presence of three subscribing witnesses. These witnesses all agree in asserting his capacity. They represent him as having been rational, and as understanding perfectly what he was doing.

Taking the whole of the testimony together on this point, I entertain no doubt as to the competency of the testator. It is not necessary that a man should be possessed of a mind naturally strong, or that the powers of his mind or memory should be wholly unimpaired, to enable him to make a valid will. Such a standard of testamentary capacity would produce infinite mischief to society. It is not the standard adopted by this court.

I do not deem it necessary on this occasion to review the cases on the subject of testamentary capacity. The subject has of late been frequently agitated. In the case of *Tace Wallace*,* the leading authorities were reviewed, and the doctrine held by judge Washington, in the case of *Den* v. *Vancleve*, was adopted in substance by the court. The judge in that case says, that "He (the testator) must, in the language of the law, be possessed of a sound and disposing mind and memory. He must have memory. A man in whom this faculty is totally extinguished, cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered; and yet his understanding be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of; and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator? as this, Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing at, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged, at the time when he executed his will?"

In the more recent case of the appeal on the will of *John Maxwell*, chief justice Ewing and justice Drake, sitting for the ordinary, adopted the same doctrine after a very elaborate and able review of the cases bearing on the subject. It may, there-

* See ante, page 572.

fore, be considered as the settled law of the court. As I do not consider there is any serious difficulty on this part of the case, and as my opinion is in accordance with the decree of the court below, I forbear going into any formal or particular review of the testimony, being satisfied that the weight of the evidence is very decidedly in favor of the competency of the testator.

Some effort appears to have been made by the caveators to show that the testator was incapacitated by reason of intoxication. The evidence discloses the fact, that he would sometimes drink too much; but so far as it seeks to establish that the testator, at the time he directed or executed the will, was in a state of ebriety, it has utterly failed.

Thomas Fine, who was one of the instrumental witnesses, says he does "not recollect any liquor being present at the time of signing the will;" and also, that the testator did not appear in liquor the evening of executing the will. The testator stayed with this witness and spent the night with him after the will was executed, and if he was intoxicated it could not have escaped observation.

Daniel B. Hartley, another testamentary witness, says he took him (the testator) to be a sober man, and saw nothing to the contrary the day the will was executed. And William Wilson, who drew the will, states expressly, that the testator was not in liquor at the time of giving the instructions, or at the time of his executing the will.

On the other hand, John J. Kitcher, a witness for the caveator, testifies, that he saw the testator and spoke to him, as he was going from esquire Wilson's to Fine's house, in company with Fine. He had not much conversation with him. Testator asked witness how his family was, and passed on. "He appeared to be a little intoxicated, by his discourse." It is obvious that the witness had but small opportunity to judge of the situation of the testator; and when it is recollected that he is entirely mistaken as to the time, and some of the circumstances attending the transaction, it is plain that his testimony can weigh but little against that already adverted to.

It is not pretended that the testator's habits of intoxication, if in his case the expression may be allowed, were of such a character as to render him habitually incompetent to the transaction of business. And consequently it is necessary for the caveator, who urges the incapacity on the ground of casual intoxication, to show its existence at the very time of executing the will, and not at a time before or after. This he has altogether failed to do.

There appears also to have been some attempt to show that the testator, who lived with Martin Andress, the principal devisee, was under his influence, and that the will was made by his procurement. This attempt, if really intended, has also failed, and does not, as I conceive, require any formal investigation at the hands of the court.

There is another ground taken in the petition of appeal, for setting aside the decree of the orphans' court. It is this: that William Wilson, one of the instrumental witnesses, and who drew the will, testified in his examination before the orphans' court, that the testator was an unlearned man, who could neither read nor write; and that in his instructions to him to draw his will he directed the said William Wilson to charge certain specific legacies, amounting to one thousand four hundred and forty dollars, on the real estate to be devised to his son, Martin Andress; that the said William Wilson neglected to make this charge; and the paper writing, in its present form, was imposed on the testator as his will. And in consequence of the personal property being insufficient to pay said legacies, they cannot be recovered, but must abate proportionably.

I am strongly inclined to conclude, from the evidence, that there has been an omission on the part of the scrivener who prepared the will, and that these legacies ought to have been charged on the land. But there is no pretence of any fraud or imposition, and the question that arises for consideration is, not as to the effect of the evidence, but its admissibility. If the testimony is admissible, then I should incline to say that the fact was shown, and that the will, as it now appears, could not be taken as the will of the testator, without supplying the omission.

Cases have occurred in the ecclesiastical courts of England, where omissions have been supplied and mistakes corrected. And what is to be taken as sufficient evidence of the fact, is a point that has been frequently discussed. Parol evidence has been admitted, but with very great caution. The courts have sometimes placed themselves upon the written instructions given, and in case of a mistake or omission, they have admitted the instructions to stand as part of the will. Thus in the case of *Gerrard* v. *Gerrard*, Prerog. 1789, the person drawing the will was instructed in writing by the testator to insert his wife as residuary legatee. The name of the wife not being known to the attorney, a blank was left for it, and it was executed by the testator with that omission. These facts were proved, and also that the testator had subsequently stated that he had left his wife executory and residuary legatee, and the defect was supplied.

The case of *Damer* v. *Jansen*, cited 3 *Phill.* 434, is more analagous to the present. The whole clause by which the testator intended to appoint his younger daughter residuary legatee, was accidentally omitted; and it was decided in the court of delegates that the clause, together with the executed will, should be taken and held as the last will of the deceased. It is to be observed, however, that in that case, as in the case of *Gerrard*, before cited, the instructions were in writing, and that parol evidence was not alone relied on.

In the later case of *Fawcett* v. *Jones*, 3 *Phill.* 434, it was attempted to introduce parol evidence to show that a variation which had taken place between the instructions and the will, was not directed by the deceased, or if directed, that she did not understand and approve it; and this was to be established by the recollection of a witness, fifteen years after the instrument was executed. The evidence was rejected. Sir John Nicholl, in giving his opinion, remarks upon the case of *Damer* v. *Jansen*, in which evidence was admitted of an averment against the formal execution of the instrument, and says, that notwithstanding the peculiar circumstances of that case, there was considerable hesitation entertained by the court in the first instance, as to the

decision upon the point; and he adds, that that case was considered as going to the utmost length to which the court could go with any degree of security.

In the case now before me, the evidence offered is simply parol evidence—consisting of the recollection of the person that drew the will, and the testimony of Stephen Andress; who says that the testator, in a conversation in eighteen hundred and twenty-eight, told him he intended so to fix his business as that the one to whom he left his farm should pay out to the others "as he wished it." And I find no authority, even in cases of wills of personal estate, that will justify me in receiving and acting upon such testimony. But this is a will of lands. The farm is devised to Martin Andress, and it is sought to charge that farm with the payment of fourteen hundred dollars; or, in other words, to diminish the devise by that amount, and purely upon parol evidence. This is altogether inadmissible. It would not only occasion an alarming insecurity in the testamentary disposition of property, but would violate the plainest principles of the law.

It may operate unequally to order the will to probate under existing circumstances, but I see no alternative. In the language of the learned judge,* whose opinion I have already cited, It is much safer for this court to adhere to the plain broad landmarks of the law. It rarely happens that a general rule is broken in upon for the relief of a particular case, that such breach of the general rule is not found to be afterwards attended with infinite mischief.

Let the decree of the orphans' court be affirmed.

NOTE, by the Ordinary. I understand that in this case the devisee has given bonds for the payment of the legacies intended to be secured by the land; which bonds are to be delivered to the legatees on the establishment of the will. This is right and just, and relieves the case from difficulty, *in foro conscientiæ*.

* Sir John Nicholl, in *Fawcett* v. *Jones*, 3 *Phill.* 434; 1 *Eng. Ec. Rep.* 457.

In the matter of the application of JOHN S. MAXWELL, for letters testamentary, &c.

Filing a caveat against the probate of a will by one of the executors named therein, is not an implied renunciation of the executorship; and if the will be admitted to probate, letters testamentary may be granted to such executor.

An executor is not lightly, or by slight or indirect circumstances, to be precluded from the trust the testator intended to confide in him.

The granting of probate, and the issuing of letters testamentary to one or more of several executors, are not a bar or preclusion of the subsequent administration by the others.

It seems otherwise, at least by the practice of the English courts, where all the executors have refused to act, and administration has been granted.

Where a will is admitted to probate, an executor named therein, if capable in law, is not to be excluded unless he has by some act of his own deprived himself of the executorship.

If the decree of the court admitting the will to probate, direct that letters testamentary be issued to one of the executors, it will not preclude the subsequent granting of letters testamentary to the other executor.

Where a will has been admitted to probate by a decree of the prerogative court, it is neither requisite nor proper to insert in the oath of the executor the usual clause, that the will is the true last will and testament of the decedent.

APPLICATION to the ordinary for the granting of letters testamentary to John S. Maxwell, one of the executors named in the last will and testament of John Maxwell, deceased. The application being resisted, and the ordinary having been of counsel with one of the parties, the cause was heard before chief justice Ewing, who was called to sit with the ordinary on the hearing of the cause.

OPINION. A writing, purporting to be the will of John Maxwell, deceased, in which Elizabeth Maxwell his widow, and John S. Maxwell and William H. Sloan were named executors, having been offered to the surrogate of the county of Hunterdon for probate; a caveat was filed by several persons, among whom were the said John S. Maxwell and his wife, who was a descendant of

the deceased. This writing, upon an appeal in the prerogative court, was declared to be the last will and testament of John Maxwell, and was admitted to probate. During the pendency of these proceedings, Elizabeth Maxwell died. John S. Maxwell now claims to be admitted to take on himself the executorship, in common with William H. Sloan, the other surviving person named as executor.

In opposition to his application, it is insisted that he is precluded—first, By joining in the caveat; and secondly, By the terms of the decree of the prerogative court.

In the first place, then, let us examine the effect of the caveat. We are without precedent in the state of New-Jersey on this question, so far as either the information of the counsel who argued the case, or my own researches, extend.

Our means of information as to the practice and decisions in the ecclesiastical courts of England, are scanty and limited. Such as are within my reach have not furnished me with a specific rule or direct precedent, whereby our present inquiry may be enlightened or guided. Nor do the doctrines we meet with in the books on the topic of renunciation, afford any very satisfactory illustration by analogy.

It seems, however, to be well settled there, that, upon the decease of a person leaving a will, the executor named in it may voluntarily appear before the ordinary, or if he delays or neglects to do so, process may issue summoning him to appear and prove the instrument. If he fails to appear on the return of the process, he is punishable by excommunication for a contempt, and letters of administration with the will annexed will be granted. If he appears, he may accept the executorship, or refuse or renounce it. A renunciation, however, cannot be made by an act *in pais*, as, for instance, by a mere verbal declaration. To give it validity it must be done by some act, entered and recorded in the spiritual court. After such refusal, and administration with the will annexed thereupon granted, the party is incapable of assuming the executorship during the life-time of the administrator. After his death, however, the executor may retract his

renunciation, however formally made. But if administration is granted in consequence merely of his failure to appear on the process, he has power at any future time, even in the administrator's life, to come in and prove the will: *Toller on Ex.* 41; *Bacon's Ab. Ex'r, E.* 9.

In *Hensloe's case*, 9 *Co.* 37, it was held, that when many are named executors, and some of them refuse, and some of them prove the will, those who refuse may afterwards, at their pleasure, administer, notwithstanding this refusal before the ordinary; but if all refuse before the ordinary, and he commits administration to another, then they cannot afterwards administer. And like doctrine is there said to have been held as early as the Year Books.

In *House* v. *Petre*, before the delegates, reported in 1 *Salk.* 311, it was held by the common lawyers that where there are several executors, and one renounces before the ordinary, and the rest prove the will, he who renounces may, by the common law, at any time come in and administer; and though he never act during the life of his companions, he may come in and take on him the execution of the will after their death.

As already remarked, I am not aware that we can refer to any decisions of our own courts, to ascertain how far these rules have been recognized here. And I should certainly hesitate to adopt them in their full and literal extent, unless compelled by inflexible authority, if, by the term refusal, we are to understand an act of renunciation, such as is used in our testamentary courts. After an act of renunciation, it is a matter of course to admit as a witness in support of a will one who is named in it as executor. Yet this rule would be an extremely unsafe one, and we can scarcely suppose it would have been adopted, if he who has thus renounced may afterwards, the will being established, come in and act as executor. Without, however, deciding how far the English rules have been recognized, or are in force here, it may be said,

1. An executor is not lightly, or by slight or indirect circumstances, to be precluded from the trust the testator intended to confide in him.

[In the matter of the application of John S. Maxwell for letters, &c.]

2. The granting of probate, and the issuing of letters testamentary to one or more of several executors, are not a bar or preclusion of the subsequent administration by the others.

3. A different course of proceeding exists and is adopted, at least in the English courts, where one of several executors has taken the executorship, and where all have refused and an administration has been granted. And there is sufficient reason for the difference. If there is already one executor, and another comes into the executorship, he does not, as in the case of an administrator, abrogate all the powers, rights or duties of the other.

It may be safely said, that where a will is admitted to probate, an executor named therein, if capable in law, is not to be excluded, unless he has by some act of his own deprived himself of the executorship. His renunciation must be either express or implied. The caveat, in the present case, is clearly not an express or actual renunciation. It speaks no such language. Nor can it be deemed, as it appears to me, an implied renunciation. A renunciation is an act whereby a person, named in a will as executor, declines to take on himself the burthen of that office. The act is, therefore, predicated of an existing office. It presupposes the existence of the will. If no will has been made, there is no executorship to renounce. Nor until it is shown that there is a will, can it appear that there is a renunciable executorship. The real nature, design and operation of a caveat, are simply to suspend the act of probate until an investigation of the validity of the instrument may be had before the competent tribunal. It seems to me not difficult to reconcile the denial of the existence of a will, with a willingness to serve as executor if a will exists and is established. If a legatee file a caveat and resist the proof of the will, he does not thereby waive or renounce his legacy, nor preclude himself from demanding or receiving it, if the will is established. John S. Maxwell may, without incongruity, by means of the caveat, stay the proof of the will until an examination is had, and even resist the proof of the instrument, and yet, if the proper tribunal declares it to be a legal will, take on himself the execution of it.

[In the matter of the application of John S. Maxwell for letters, &c.]

The second objection to the application is founded on the terms of the decree; which, after declaring the instrument to be the will of the decedent, and as such entitled to probate, directs that letters testamentary be issued "to the *surviving executor*," thereby meaning, as we learn from the title of the decree, William H. Sloan.

There is nothing in the language of the decree to exclude in terms the present application; and being so, there is nothing in the nature of such a decree to produce this effect; for we have seen, that where several executors are named, the issuing of letters testamentary to one of them does not preclude a similar act subsequently done in respect to the others. And even if this may not be done here after a renunciation or refusal, yet no doubt, I think, can exist that it may be done where there is an omission to claim to be introduced into them when first issued, without such actual renunciation. Every grant of letters must be on an order or decree made or supposed to be made.

Upon the argument, the counsel in opposition to the claim, insisted on the oath to be taken by the executor, that the testator was of sound and disposing mind and memory, as proof, if not of a legal obstacle, at least of the impropriety of this application by one who had impugned the will on the ground of incapacity in the testator. But the ordinary form of the oath administered to an executor does not contain the supposed clause. It avers, indeed, that the will is the true last will and testament of the decedent. And there seems no inconsistency now in saying so, since the decree of the prerogative court has established it to be such. But I do not apprehend it requisite, or even proper, to insert that clause in the oath of the executor, where a decree for probate has been made on an appeal, in the prerogative court, however apt and proper it may be thus to verify the instrument when the letters testamentary are granted without contest on the production of it to the surrogate. At present the oath required needs only to extend to the faithful discharge of the office or trust.

Upon the whole, I can discover no legal impediment to the application, and therefore most respectfully recommend to his ex-

celleney the governor and ordinary, to grant letters testamentary to John S. Maxwell.

CHARLES EWING,
Chief Justice Supreme Court.

Feb. 6, 1832.

Decree granting letters testamentary, pursuant to the recommendation contained in the opinion.

OCTOBER TERM, 1832.

ELIZA B. WALLACE v. MARY M. WALLACE.

The act entitled "An act relative to the probate of wills," passed March 6th, 1828, (*Harrison*, 195,) has no reference to a will executed in this state, by one who at the execution of the will, and at the time of his death, lived in this state. The act has reference to foreign wills only.

APPEAL from a decree of the surrogate of the county of Middlesex, directing that a copy of the will of Joshua M. Wallace, proved in the state of Pennsylvania, should be filed and recorded, and that letters testamentary should be granted to Mary M. Wallace.

Southard and *Hornblower*, for appellant.

G. Wood, for respondent.

THE ORDINARY. The following case is presented by the papers sent up and the proofs and admissions of the parties.

In the year eighteen hundred and nineteen, Joshua M. Wallace, having resided many years previously thereto in the county of Burlington, died in that county, leaving a last will and testament, of which he appointed his wife, Tace Wallace, and his brother-in-law, William Bradford, junior, executors. William Bradford, junior, died before the testator, and Tace Wallace re-

nounced her right to act as executrix. The testator was possessed of personal estate in the state of Pennsylvania as well as in the state of New-Jersey; and after the renunciation of Tace Wallace, Joshua M. Wallace, junior, possessing himself of the said instrument, presented it to the register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia; and having proved the hand-writing of the said testator by the oath of two witnesses, (not subscribing witnesses to the instrument,) administration with the will annexed was granted to the said Joshua M. Wallace, junior, of all and singular the goods, chattels, rights and credits of the deceased. This administrator afterwards died, and thereupon Tace Wallace, the surviving executrix named in the will, appeared before the register in Philadelphia, and took upon herself the burthen of the execution of the will. Tace Wallace having departed this life, Mary M. Wallace, who is the executrix of, and has lawfully proved, her last will and testament, made application, in June, eighteen hundred and thirty-one, to the surrogate of the county of Middlesex, in this state, to have a certified copy of the said will of Joshua M. Wallace, and of the probate thereof, filed and recorded in this office, according to the provisions of the act entitled "An act relative to the probate of wills," passed March sixth, eighteen hundred and twenty-eight. The surrogate gave notice according to the request; and after hearing the parties, he did, on the thirty-first of October, eighteen hundred and thirty-one, order and decree that the copy of the will of the said Joshua M. Wallace should be filed and recorded, and that letters testamentary thereon should be granted to the said Mary M. Wallace, the applicant. From this decree of the surrogate an appeal has been taken, and the question whether such decree was rightfully made, is now before this court.

A variety of objections have been taken to the proceedings before the surrogate. It is insisted, that as the testator lived and died in the county of Burlington, the proceedings should have been had in that county, and not in Middlesex; and also, that the decree made by the surrogate is not in conformity with the

notice, but embraces matters not contained in it; and further, that the question of the validity of this will is now pending in the court of chancery of this state, and pending that suit the will should not have been admitted to probate. These are all matters of sufficient importance to deserve inquiry at the hands of this court. But a graver question than is involved in any or all of these objections, grows out of another point raised by the counsel of the appellant; which is, that the act itself, under which these proceedings have been had, does not apply to a case of this kind; that the statute has reference, or was intended to have reference, only to foreign wills, and not to wills made and executed within the state, by persons whose domicil was also within the state. As this objection, if well taken, is fatal to the decree not only, but to the power of the surrogate making it, I will examine it in the first place.

The words of the act are very broad and comprehensive. It is enacted, "That when any will shall have been admitted to probate in any state or territory of the United States, or in any foreign state or kingdom, and it shall become necessary or desirable for the executor or executors named in such will or codicil, or for any of the persons interested therein, to have such will proved and recorded in this state, it shall and may be lawful for any surrogate of any county in this state, upon application made to him for the purpose, and upon filing in his office an exemplified copy of such will, to make an order that cause be shown before him, at a certain time and place therein to be expressed, not less than thirty days nor more than six months from the time of making such order, why a duly certified copy of such will and codicil or codicils thereto, if any, should not be filed and recorded in the office of such surrogate, and letters testamentary thereupon be issued to such executor or executors as aforesaid, or letters of administration with the will annexed, as the case may require; which order shall be published in such manner as the surrogate making the same shall direct."

The words of the act, taken in their literal sense, will certainly include the will, a copy of which has been ordered by the

surrogate to be filed and recorded. They will embrace not only foreign wills, but those made and executed here, by residents of the state, and taken to another state and there proved. And it will follow as a matter of course, that all wills made in this state by persons who may happen to have any property in a sister state, may in the first place be taken and proved there, according to their state regulations, and that thereupon a certified copy may be brought here, and without any further proof filed and recorded. The statute embraces wills of lands as well as of chattels; and by the second and third sections of the act, the letters testamentary are to have the same force and effect, and the certified copies of such recorded wills shall be evidence in the same manner, and have the same force and effect, in all courts of law and equity, as they would have if such will or wills had been proved in the usual manner, under the existing laws of this state.

In construing a public statute, courts will be governed, in ordinary cases, by the plain meaning of the words made use of by the legislature. They are not to inquire into the policy or impolicy of the statute; but if there be nothing that ought, upon the sound rules of interpretation or construction, to vary the natural import of the words made use of, they are bound to carry it into effect.

It is true, nevertheless, that in the construction of statutes, where there are two or more *in pari materia*, all must be taken together. They must be looked upon as different parts of one system, and as having one general object in view. This is necessary to ascertain and effectuate the intention of the lawgiver, and to harmonize laws relating to the same subject. Upon the strength of this rule of construction, it is argued by the counsel of the appellant, that this act must be considered as having reference to foreign wills, and not wills made in this state by persons resident therein. The act of 1713—14, (*Rev. Laws*, 7,) directs the mode in which wills shall be executed so as to pass real estate in New-Jersey; and it provides in the third and fourth sections, the mode in which wills made in any part of the kingdom of Great Britain and Ireland, or in any of the colonies, by

which lands were devised in this colony, may be received in evidence in any of our courts of judicature. They are to be certified, if made in Great Britain or Ireland, under the seal of the office where they are lodged; and if made in any of the colonies, they are to be proved according to the custom of said colony, and certified under its great seal; and in both cases the certified copies shall be esteemed as valid and sufficient as if the original will or testament were then and there produced and proved. This provision is very ample. It goes further than the act of congress, which has subsequently provided for the introduction of exemplified copies of records among the different states. By that act they are simply made evidence of the existence of such records; by ours, they are declared as valid as if the will itself was then and there produced and proved.

It will be perceived, however, that our act of 1713—14, makes no provision for filing or recording such foreign exemplifications; nor was the ordinary, or any one acting under him, authorized to grant letters testamentary. Hence arose a difficulty which has long been felt in our state. Foreign executors, having proved a testament abroad, were unable to collect such assets as might be within the state. They could make no conveyance of lands. Their authority to act was not recognized in our courts. And even those who came with letters testamentary from sister states, were not permitted to sue as such. Such, at least, I understand to have been the practice, though I am not aware of any judicial decision on the subject. To remedy the inconvenience, an act was passed in December, eighteen hundred and twenty-five, entitled, "An act relative to wills, administrations and guardianships granted without this state." That act authorized the ordinary, or any of the surrogates, to file and record copies of wills, &c., proved and recorded in any foreign kingdom or in any of the United States; and declared that the copy of the will thus recorded should have the same force and effect as if the will had been proved before the ordinary or any of the surrogates. It made no provision for the granting of letters testamentary, but authorized the executor to sue and to have the same privileges

in courts as if the will had been proved in this state. The difficulty was not removed. The authority to sue gave the executor no power to sell and convey personalty or land, or to do other acts which might be necessary in the execution of his trust. The present act repealed that of eighteen hundred and twenty-five, and is a substitute for it, and as we have already seen, it authorizes the granting of letters testamentary, and gives them the same force and effect as if the will had been proved by the subscribing witnesses in the usual manner under the laws of this state.

If it is considered that this act comes in aid of the original act of 1713—14, the argument is a fair one that it was intended to apply only to the cases in which by that statute certified copies were received as evidence; that is to say, copies of wills *made and* proved in foreign countries, or in the different states, and not to wills made within our own state. It can hardly be supposed that the legislature would gravely enact a law that the will of a man living and dying in this state—and which will was made within the state—might be proved in Pennsylvania or New-York, and then a certified copy be brought here for probate. The practice of first proving our wills in other states, has never yet obtained. No inconvenience or difficulty had been experienced from that source; and I cannot believe that the legislature ever intended to make provision for a case so anomalous. All that was necessary to complete the system of our statute regulations respecting wills, was that some mode should be adopted whereby the executors of foreign wills, regularly proved according to the laws of the country where they were made, might exercise their power under them in this state. The argument derived from this rule of construction is entitled to great consideration.

Where the construction of a statute is doubtful, it is proper in expounding it to take into consideration the consequences that may result from it; for it will never be presumed that the legislature intended to pass an act that would lead to mischievous results, or unsettle the general principles of the law.

Our act does not determine in what county a will shal proved; but there can be no doubt that the county where the tator dies, if that was his domicil, is the proper county. such has been the uniform practice, save only where will proved before the ordinary. As the law now stands, no will be admitted to probate until the expiration of ten days from death of the testator. Whether it be a will of lands or of sonalty, or of both, all persons interested have a right to fi caveat against its being proved; and they know how and w this must be done to insure a fair hearing on the merits. will may be contested before the orphans' court, and before court by way of appeal. But if a literal and strict construc is given to this act, the will of a testator dying in the co of Bergen or Gloucester, may be taken to New-York or Pl delphia, and there proved without the knowledge of legatee others interested, and then the executors or others interested make application and have certified copies of them admitte probate within this state. In such case, if the will were a of personalty, where would be the opportunity of contestin or examining into the sanity of the testator? And even were a will of lands, the privilege of contestation in the civil courts would be taken away. It is no answer to say, that c of fraud or collusion might be inquired into. The diffic would be, that whenever there were assets in New-Yorl Philadelphia, the executor would have a right, (if he chos exercise it,) to have the will proved in either state as an orig will. The probate courts there would have jurisdiction, an would be no easy matter to fasten fraud upon an executor doing what he was directly authorized to do by an act of th gislature. But again, the executor having the will prove some sister state, say New-York, may take a certified copy to the surrogate of any county, and request that it may be and recorded. He may go to the surrogate of Warren or C May, and although the surrogate may give full notice to all ties interested, it is plain that any thing like contestation mus attended with great inconvenience and expense. And it app

to me that the very fact that these letters testamentary may be granted by the surrogate of any county, goes far to show, that the act has reference to foreign wills only—to cases where the testator has no domicil within the state. We have seen that the uniform practice, in all cases where the testator has a domicil within the state, is to prove the will in the county within which the domicil is. It is only in cases where there is no domicil, that wills have been proved before the surrogate of any county; and it is doubted by some whether in such cases there is power any where except in the ordinary to grant letters testamentary or letters of administration in cases of intestacy.

I think it manifest that to construe this statute literally, would tend greatly to mar the system and harmony of our laws regulating the proof of wills, and might lead to consequences not easy to be foreseen. Yet I am aware that the principle of expounding statutes from their consequences, is to be exercised with great caution. That it is difficult of application, is no argument against its proper use. And I would adopt the language of the court in the case of the *United States* v. *Fisher*, 2 *Cranch*, 390: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

When we look at the consequences of a literal construction of the act, it may fairly be inferred that they were never within the intentions of the legislature. In giving a construction to this act, it may be useful to look at the laws of some of our sister states on the same subject.

In Massachusetts, an act was passed in seventeen hundred and eighty-five, for the filing and recording of wills proved without the government. The terms of the act are general, applying to the copy of any will that has been proved and allowed in any probate court in any of the United States, or in any foreign state or kingdom; and the provisions of this act are very similar to our own. In *Goodwin* v. *Jones*, 3 *Mass. Rep.* 521, chief justice

Parsons decided, that the administrator of a person dying in Connecticut, taking out letters of administration in that state, could not by virtue of them prosecute or defend an action in Massachusetts. In the opinion delivered in that case, the chief justice says, "We have no particular statute relating to foreign administrations; but the manner in which an executor of a will proved without the state may execute his trust within, is regulated by the statute of seventeen hundred and eighty-five"—which is the one just referred to. He then adds, "It would be inconsistent with the beneficent intent of the statute, to allow an administrator of an intestate, not an inhabitant or resident within the state at his death, an authority derived from a foreign administration, which he could not have under the foreign probate of a will, of which he was the executor." The learned judge appears to consider the case of foreign probates and foreign administrations as applying to non-residents—and argues, that as the one case is provided for by statute and the other not, a foreign administrator of a non-resident has no authority. So far as that dictum goes it is favorable to the exposition contended for by the counsel of the appellant.

In seventeen hundred and ninety, New-Hampshire passed an act on the same subject, but it is precisely a copy of that of Massachusetts, and I do not know that any construction has been given to it in their state courts.

In Connecticut, the statute relating to the proving of foreign wills, refers expressly to wills *made* and proved in a foreign country: 3 *Law Reg.* 71. Such is the case also in Delaware, Maryland, Illinois, Indiana, Missouri and Maine.

The states of New-York, Georgia, Tennessee and Louisiana, have no statute provisions on the subject. From this we see that in a majority of the states where the proving of foreign wills has been made a matter of statute regulation, the statutes have reference only to wills made as well as proved out of the state; and I am led to believe that such was the construction intended to be given to the act of Massachusetts, of which ours is, as to the point in dispute, a copy.

The question then arises, Are all these circumstances sufficient to authorize the court to give to the statute the construction contended for by the appellant? I think they are; and although I feel much hesitancy in going against the plain words of the act, yet taking it in connection with others on the same subject—looking at the difficulty intended to be remedied, and seeing the consequences that may result from a construction that I am satisfied was never intended by the legislature, and aided by the view taken of the same matter in other states, I feel it my duty to declare that the act can have no reference to a will executed in this state, by one who then and at the time of his death lived in the state, although the will may have been taken to a foreign state and proved there before a court having competent jurisdiction.

Let the decree of the surrogate be reversed and set aside.

APRIL TERM, 1835.

LEWIS COMBS v. GEORGE JOLLY and JAMES JOLLY.

To constitute a valid will of real estate under the statute of New-Jersey, the testator must sign the will in the presence of the subscribing witnesses. A mere acknowledgment of his signature is insufficient.

To support an instrument as a will of personal estate, it must be shown that it was intended and understood to be a will, and executed as a will.

APPEAL from a decree of the orphans' court of the county of Middlesex, refusing probate of an instrument propounded as the will and testament of Lewis Jolly. The instrument exhibited for probate was as follows, to wit:—

"To all persons to whom these presents may concern. I, Lewis Jolly, of the township of South Amboy, county of Middlesex, and state of New-Jersey, being weak of body, but of sound mind and memory, (blessed be God,) do nominate, ap-

point and authorize my friend, Lewis Combs, of the same place, to be my administrator (after my decease), to collect all my debts whatsoever, and to give receipts for the same in his own name, and the same to make use of as he may think proper; and to pay all just demands against me and my estate for funeral charges or otherwise; and to dispose of my real and personal property as he may think proper, to his own benefit, without let, suit, hindrance or molestation from my heirs or any other person claiming any right or title for the same from or under them or any of them. In witness whereof, I have hereunto set my hand and seal, this third day of May, in the year of our Lord one thousand eight hundred and twenty-seven.

"LEWIS JOLLY. [L. S.]

"Signed and sealed in the presence of Henry B. Smyth, Caleb T. Smith and Aaron Combs."

Adrain, for appellant.

Disborough, for the respondents.

THE ORDINARY. The paper offered for probate as the last will and testament of Lewis Jolly, bears date on the third day of May, eighteen hundred and twenty-seven, and purports to be signed by said Lewis Jolly as the testator; and by Henry B. Smyth, Caleb T. Smith and Aaron Combs as attesting witnesses.

In support of the will only one of the witnesses has been called, the other two having departed this life before the testator. The testimony of Caleb T. Smith, who is the surviving witness, is wholly insufficient to make out the factum of the will, and leads to a suspicion that the instrument was palmed upon the testator as one of a very different character.

As a will to devise real estate, it cannot be proved. Our statute (*Rev. Laws*, 7) requires all such wills to be made in writing, signed and published by the testator in presence of three subscribing witnesses. This paper was not so signed. Caleb

T. Smith swears expressly that "Mr. Jolly did not sign the will in his presence." He merely acknowledged it. There is a wide difference between signing the will in the presence of the witnesses, and acknowledging the execution of it. Under the English statute, 29 *Car.* 2, it is held that the acknowledgment is sufficient; but by that statute it is directed that the will shall be in writing, signed by the party making it, and attested and subscribed in the presence of the devisor by three or four credible witnesses.

The supreme court, in the late case of *Den* v. *Mitton*, 7 *Hals.* 70, gave a strict construction to our act, and held that the signing must be in presence of the subscribing witnesses, and that a mere acknowledgment was insufficient. That decision has been acquiesced in, and having been pronounced by the proper legal tribunal, I feel no disposition to call it in question.*

Again: The will was not published by the testator as his last will and testament. Such is not the form of the attestation, which is simply, "Signed and sealed in the presence of." This might not be important if the publication was sufficiently proved by the testimony of the witnesses. Smith says, Jolly acknowledged it to be his hand and seal, in answer to the question from one of the other subscribing witnesses, and that it was for the uses and purposes therein mentioned. And again he says expressly, "Mr. Jolly did not declare the instrument to be his last will and testament." I incline, with the chief justice in the case already cited, to doubt whether this is sufficient; and I think that the safer rule is to require a literal construction of the statute, in regard to the publication as well as the signing. In the case now before the court, there was not only no publication by the testator, or any one for him, but the witness did not even understand that the instrument was intended for a last will and testament; on the contrary, he understood it to be an article for a certain piece of land.

The death and signatures of the other two subscribing witnesses are proved; but their testimony, if present, whatever it

* Accord. *Den* v. *Matlock*, 2 *Hay.* 86.

might be, could not authorize the probate of this instrument as a will of real estate.

Nor can it be proved as a will of personal estate under the evidence. To make it such will, it must be shown that it was intended and understood to be a will, and executed as a will. This is not proved; on the contrary, the witness says that Mr. Jolly, the alleged testator, and Mr. Combs, one of the witnesses, both told him that it was an article for a piece of land. Again he says, He does not remember whether the instrument was read to him or not; he does not think it was, but he thinks he had a pretty fair understanding that it was an article for a piece of land: he was told so by Mr. Jolly and the others. If this testimony is to be believed, (and it is from the executor's own witness, uncontradicted,) there is an end of the case. If Jolly spoke the truth, and actually believed what he said, he could not have executed the paper as a will; he could have had no such intention, and without such intention there can be no will.

The fact that the other witnesses also told Smith that it was an article for a piece of land, shows either that they did not know themselves what the instrument was, or that they were deceiving Smith; and why they should deceive Smith, except for the purpose of deceiving Jolly too, who was present at the time, I am at a loss to conjecture.

But it is unnecessary to speculate on the subject. The will cannot be admitted to probate either as a will of lands or of goods; and the decree of the orphans' court must be affirmed, with costs to be paid by the appellant.

Decree affirmed.

LUTHER GOBLE junior, and Wife, v. PHEBE GRANT et al.

If previous general insanity or incapacity be established, the burden of showing capacity at the time of executing the will, rests upon the person offering it for probate.

Though the omission by a testator to make any provision for a part of his children, will not of itself suffice to establish incapacity, yet such an omission not satisfactorily accounted for, is entitled to great consideration when there is any evidence of a fraudulent procurement of the will, or when the will is made by the testator *in extremis* in favor of those around him.

Where there is a fair ground for re-examination, costs ought not to be awarded against the appellant, though the decree be affirmed.

APPEAL from a decree of the orphans' court of the county of Essex, admitting to probate an instrument purporting to be the last will and testament of Zephaniah Grant. The instrument was offered for probate by the executors. The caveat was filed by one of the testator's daughters and her husband.

Jackson, for appellants.

W. Pennington, for respondents.

THE ORDINARY. On the third of September, eighteen hundred and thirty-three, a caveat was filed in the surrogate's office of the county of Essex, by Luther Goble, junior, in behalf of himself and his wife Sarah, formerly Sarah Grant, against proving any instrument purporting to be the last will and testament of Zephaniah Grant, then lately deceased. On the tenth of the same month, an instrument purporting to be the will of Zephaniah Grant, was offered for probate at the office; and citations having issued to bring in the parties interested, and the evidence as well for as against the instrument having been heard and duly considered, the orphans' court, on the fourteenth of December, eighteen hundred and thirty-three, adjudged and decreed that the said instrument was the last will and testament of the said Zephaniah Grant, and ordered the same to be admitted to

probate. From this decree the caveators appealed, and at the last stated term the cause was submitted to the court without argument.

On examining the evidence, I have discovered nothing illegal or irregular in the execution of the will. After having been prepared, according to the direction of the testator, by a professional gentleman of the place in which he resided, it was carried to him, distinctly read over to him, and approved. It was then signed, published and acknowledged in the presence of three witnesses, who signed their names to it in the presence of the testator and of each other. The factum of the will appears to be in entire conformity with the statute.

I presume the question intended to be raised by the evidence is, whether the testator, at the time he executed the will, was of sound and disposing mind and memory; or in other and more simple language, whether his mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged, at the time when he executed the will. Upon this point there appears to be but one opinion entertained by those who were present at the time and participated in the transaction.

Henry Rogers states, that on the day before the will was executed, he was sent for to the house of testator, and there received from him instructions for drawing the will; and that no person was present with them at the time. On the day of the execution of it, he carried it to the testator, and read it to him before he executed it. He has no doubt, and never has had any, that at the time of giving the instructions and of executing the will, the testator was of sound understanding. The testator took the will after it was executed, and some time after met him in the street and paid him for the service. He knew nothing particularly of the habits or capacities of the testator before the will was drawn. He was feeble at the time, and the witness found him sitting up in the chair, and he said he had been unwell; he thinks he said his disease was pleurisy. The testator was at that time, and has been subsequently, engaged in business.

Jonathan E. Crane, another instrumental witness, says, it is so long since the transaction that he does not recollect the conversation at the time; but he is of opinion the testator understood the business of the will; that no idea came across his mind at the time of the execution of the will, that the testator was unsound in mind. He looked pale and weakly, as if he had been ill. He was then engaged in business, and has been since, up to the time of his decease, in September, eighteen hundred and thirty-three.

Jonathan Cory, the other instrumental witness, says, he lived near the testator, and was on terms of considerable intimacy with him: had been acquainted with him ten years and upwards. The witness cannot recollect whether the testator had been unwell at the time of executing the will; but witness considered the testator as understanding what he was about, nor has he any idea that the testator was not of sound mind, nor has he ever had. He has seen testator at times in liquor, when he thought him disqualified for the purpose of making a will; but is satisfied that the testator was at that time sober and rational. He would not otherwise have witnessed the will. Witness was well acquainted with him, and could have discovered any thing like intemperance. The witness further states that the testator, when he died, was about sixty-five years of age, and that he had occasional turns of intemperance, at which times he was not capable of attending to business; that he never saw him unsound in mind except when under the influence of liquor; that he has seen him immediately upon a recovery from one of his capers, and that then he was capable of doing business.

The testimony of the subscribing witnesses makes a strong case in favor of the will.

The caveators do not pretend to set up any thing like general insanity or incompetency previous to making the will. If such state could be established, the burden of showing capacity at the very time of executing the will, would rest upon those offering it for probate. As it is, it rests upon those who make the allegation of insanity or incapacity, to make it out to the satis-

faction of the court. If they fail to do this, the will must be proved.

If I have rightly apprehended the case, the caveators put themselves upon this position, that the testator was a man who was addicted to occasional fits or seasons of intemperance; that during those periods, and while he was recovering from the effects of his misconduct, he was incapable of transacting business, and that he was in such situation when the will was made. This I take to be the strong if not the only objection urged against the will.

As to the fact of occasional intemperance, there can, unfortunately, be no doubt; all the witnesses who speak on this subject agree in their statements; and they also agree in opinion, that when under the influence of liquor, during those periods, he was not competent to attend to business. Was such his situation when he made the will? That is the point to be established by the caveators. Have they established it?

The will bears date the twenty-third of August, eighteen hundred and twenty-four. The first witness examined on the part of the caveators is Aaron Conselyea. He first knew the testator on the fourteenth of July, eighteen hundred and twenty-four: went to work with him at that time and continued for four years, and boarded with him. The testator would have one or two frolics in a year, and they would continue a week or two weeks, during which he was destitute of his mind and senses the most part of the time, and paid little attention to business. For some days or a week after his frolics, while convalescent, he would not be restored to his mind, as witness supposes from what he saw of him: he evinced, as witness thinks, a feebleness of body and mind. The first of these frolics after witness went there, was, he thinks, about August—from four to six weeks after he went; and if he had one it was slight, or of short duration. He says afterwards, he thinks that the testator either had one of these frolics or was about to have one and had some other complaint at the time he has been deposing to, but the present impression of witness is, that it was one of his intemperate frolics.

On his cross-examination he says, that in speaking of the effects of testator's frolics during the after week, he means more particularly as to his strength of body than of his mind. He cannot state any act of the testator, indicating a want of mind, during the "recruiting days," nor can he state any thing about the mind or capacity of the testator at the time the will was executed—for he does not know when it was made. He cannot say positively that the testator had any frolic in the month of August, eighteen hundred and twenty-four, but he thinks he had. Witness thinks there was some other complaint with which the testator was ill at that time, and has some indistinct recollection that the family called it pleurisy.

The testimony of this witness can have little or no weight in making out the fact, that at the very time of executing the will the testator was legally incompetent. He speaks, as he says, from general recollection, the most treacherous of all guides in reference to dates and times. He thinks testator had one of his capers in August, but is not certain; nor is he certain whether it was really one of them, or the pleurisy, with which the family said he was visited; and whether it was one or the other, he can give us not the least information as to the state of testator's mind when the will was made, for he does not know when that was. This evidence, standing alone, is entitled to but little consideration.

The next witness is Stephen V. Taylor. He details the manner and frequency of testator's frolics very much as has been done by the former witness, and thinks that testator, during the period of his convalescence, was not capable of attending to his business. He worked for testator in August, eighteen hundred and twenty-four, and thinks he had a frolic, which was succeeded by sickness. Knows he was dangerously ill during that season, and thinks it was about the time of the frolic.

On his cross-examination he says, he thinks the termination of the frolic he has spoken of, was an attack of pleurisy, and thinks that Dr. Ward was his physician. He depends on his general memory as to dates, and cannot say that the frolic spoken of was in August.

This evidence is also vague and uncertain, and sheds little or no light on the matter in controversy.

Moses Dodd says he was master builder of the Third Presbyterian Church, and the firm of Grant furnished the stone; the principal part of the stone-cutting was done in July, August and September, and that during this time testator's habits were not temperate and steady. He thinks the effects of intemperance were peculiar on the testator: would not suppose him for some days after a frolic capable of doing business; and during that time he had not much mind of his own, and was very tractable. He does not know the situation of testator the day the will is said to have been made.

The case is not varied, so far as relates to the state of testator's capacity at the time of executing the will, by the evidence of James Whittemere, who is the next witness examined. His knowledge of the testator's habits about that period, is derived principally from information of the family and others. As to his habits generally, he concurs in the main with the witnesses of the caveators.

Dr. John Ward states, that he was called to visit the testator on the twenty-second of August, eighteen hundred and twenty-three, (which appears to have been the day the instructions for the will were given, as the will was executed on the twenty-third,) and found the testator very ill, as he infers from the medicine he left him; that on the twenty-third and twenty-fourth he visited him again, and must have found him much better, as he left nothing for him on either of those days. From the treatment he judges he must have been apprehensive of inflammation. His disease, he thinks, was not pleurisy, but a spasmodic affection of the muscles. The disease may have resulted from an intemperate frolic, but he does not know that it did.

On his cross-examination he says, there was nothing in the disease of which he supposed the testator to be ill, inconsistent with the full possession of his faculties.

From this view of the case as presented, I think it plain that there is no direct evidence to show, that at the time the will was

made, the testator was not in possession of the ordinary degree of mind and memory, or that he was in such a state as not fully to understand the business in which he was engaged.

There is, however, some evidence of an indirect character, which is calculated to have a bearing on the case, and will now be adverted to.

It appears that at the time of making the will, the testator had seven children; four unmarried daughters who were living at home, two daughters who were married and living from home with their husbands, and one son, Charles Grant. By the will only a small portion is given to Charles, and the married daughters receive nothing, nor are they mentioned at all. It appears further that their circumstances were not affluent, and that they had not been provided for by previous gift, except with something in the nature of an outfit at the time of marriage. So far as Charles is concerned, the provision of the will is in some measure accounted for; for Henry Rogers states, that he thinks testator, at the time the instructions for the will were given, expressed his conviction that he had made sufficient provision for his son Charles. Whether it was intended that the provision in the will was such provision, or that he had been provided for otherwise, is not very clear, nor is it very important. The testator's property at that time was small, and it would not be the duty of the court to scan with accuracy the amount received, or to be received, (even if sufficient facts were before it,) so as to determine whether the provision was a just proportion of the estate or otherwise.

In relation to the two married daughters, the omission to make any provision for them in the will, is not satisfactorily accounted for; and if there was any evidence of a fraudulent procurement of the will by that portion of the family who were at home, to the exclusion of those abroad, it would be a strong circumstance. Or if the will had been made by the testator *in extremis*, in favor of those around him, to the disinherison of other heirs, towards whom he had always exhibited an equal degree of natural affection, it would be entitled to great consideration.

But such is not the case. There is nothing in the whole evidence that looks like procurement on the part of the unmarried daughters or any of the family or their friends; and the testator, after having made the will, recovered from his indisposition; and he was conusant of the fact of having made the will, for he afterwards paid the attorney who prepared it for his services, and retained the instrument in his house up to the time of his death.

This omission, however singular it may appear, and however unable we may be to account for it satisfactorily, is not sufficient to overturn the evidence of sanity adduced by the executors. Independently of this one circumstance, there does not appear to me to be a reasonable doubt as to that evidence; and it would be dangerous to admit as a principle, that a discrimination made by the testator among those objects of his bounty who appear to have an equal claim upon him, or even the total exclusion of some of them, is sufficient to establish incapacity. Very often, the object of making a will is to discriminate, or to exclude and give preferences; and not unfrequently, the reasons for so doing are known only to the testator; and hence, if his competency be clearly established, is of comparatively little consequence.

There is some evidence going to show the testator's views of the propriety of making distinctions among children in the distribution of property, and that on a certain occasion he disapproved of such a course on the part of a relative. Admitting this to be so, it is not an uncommon thing for persons to lay down rules for others as to the management and distribution of property, which they themselves are not always willing to follow. Nor is it uncommon for persons to change their minds materially as to the disposition of their estates by will. But the evidence itself is of doubtful character in point of admissibility. Even express declarations of intention to dispose of property in a particular manner, is not to be received, unless when offered to repel or sustain a charge of fraud or circumvention of the devisee in obtaining the will: *Den* v. *Vancleve*, 4 *Wash.* 266.

Taking the whole evidence together, I am clearly of opinion that the caveators have failed to make out a want of capacity in

the testator at the time the will was made, and that there is no evidence of fraud in the procurement of it. The case, to my mind, is entirely clear, and I shall therefore affirm the decree of the orphans' court ordering the will to probate; and shall further order that the costs of this appeal be paid by the appellants. This is not usually done, nor ought it to be where there is a fair ground for re-examination before the court. It is because no such ground is perceived that costs are awarded in this case.

Decree affirmed.

In the matter of the Division of the Real Estate of JACOB S. THOMSON, deceased.

To justify the court in setting aside a partition of real estate on the ground of a mistake in judgment on the part of the commissioners, the mistake must be a serious one, and the evidence of it too plain to be mistaken.
If the evidence be doubtful or contradictory, the report will be sustained.

COMMISSIONERS appointed by the court to make partition of the real estate whereof Jacob S. Thomson died seized, having made the partition, made report thereof, pursuant to the act. One of the parties interested, being dissatisfied with the share allotted to him, obtained a rule to show cause why the report of the commissioners, and the partition by them made, should not be set aside. The matter came on for hearing upon the rule to show cause.

Wall, in support of the rule.

Wilson and *Southard*, contra.

THE ORDINARY. In April, eighteen hundred and thirty-two, an order of this court was made, appointing commissioners to divide the real estate of Jacob S. Thomson, deceased, late of the county of Warren.

[In the matter of the Division of the Real Estate of Jacob S. Thomson.]

On the eighth day of April, eighteen hundred and thirty-three, the report of the commissioners was filed in the office of the register, and on the same day an order of final confirmation was made and signed by the ordinary.

On the thirteenth of April, eighteen hundred and thirty-three, a rule was granted to show cause why the decree and the report of the commissioners should not be set aside.

This rule was discharged in October term, eighteen hundred and thirty-three, in consequence of which the division stood confirmed.

The order of October term, eighteen hundred and thirty-three, was afterwards set aside as irregular, it having been made without notice and exparte; and the question comes up at this term, on the rule to show cause why the report of the commissioners should not be set aside. The decree of confirmation, made the same day on which the report was filed in the office, being clearly irregular, there is nothing to consider but the report itself.

The single objection to the report is the inequality of the division. To justify this court to interfere in a case of this description, and set aside a division on the ground of a mistake in judgment on the part of the commissioners, the mistake must be a serious one, and the evidence of it too plain to be mistaken. If the evidence be doubtful or contradictory, the report will be sustained, for if it were otherwise, a large majority of the divisions would be set aside, where the estate is of any magnitude, and consists of various species of property. Upon no subject do men differ more in opinion than in the value of real estate. The present case furnishes a most remarkable instance of it, and seems to show in what difficulty the court would be involved by lending an easy ear to applications of this nature.

Jacob S. Thomson esquire, died seized of a large real estate in the counties of Warren, Sussex and Hunterdon, consisting of farms, mills, wood land, mountain land, and town lots. To make a judicious division of this property, in five equal shares, required a knowledge of all kinds of real property, united with sober judg-

ment and sound discretion. The commissioners selected by the parties were men possessing those qualifications in as great a degree as any others who could be selected. All of them were extensive land owners, two of them were owners of mills, and all were well qualified to judge of the value of property of that description. They viewed the whole estate, weighed the advantages and disadvantages, and estimated the value of the whole and of every part, and having completed the division, made the assignment without reference to the wishes or partialities of either of the parties in interest.

One heir out of the five complains that the division is unequal. There has been much testimony taken on both sides, the greater part of it has been directed to one point, that is, to show that the share of the exceptant is worth less than the share assigned to the heirs of Robert C. Thomson, or to Jacob T. Sharp. According to the testimony of the exceptant's witnesses, the difference is somewhere about two thousand dollars. On the other hand a greater number of witnesses prove that there is no such inequality, or if there is any, that it is very trifling. One other prefers the exceptant's share to that of the heirs of Robert C. Thomson; and another prefers it to that of any of the heirs.

The principal difficulty appears to consist in the different opinions entertained by the witnesses as to the value of a farm of three hundred and thirty-two acres assigned to the exceptant. On one side, it is valued by one witness at thirteen dollars and sixty-three cents; by a second at twelve to fourteen dollars; by a third at fourteen dollars; by a fourth and fifth at fifteen dollars; by a sixth at fifteen to sixteen dollars; by a seventh at sixteen to seventeen dollars, by the acre. On the other side, some witnesses value it at twenty dollars by the acre; and another one at twenty-one or twenty-two dollars. The difference between these valuations is greater than the supposed difference between the share assigned to the exceptant and that of any of the other heirs. One set of witnesses agrees in the main, with the commissioners—the other differs. How shall the court decide? The evidence cannot be reconciled. And what renders the matter

still more embarrassing is, that each party has undertaken to prove that the witnesses on the other side are not competent judges. Under these circumstances, the court is not called on to adjudicate between them, or to say who is most worthy of credit. The report of the commissioners must stand, unless it can be satisfactorily shown to the court to be wrong. The commissioners have acted under the sanction of an oath; they had as good opportunity of judging of the property as any of the witnesses, and better than some of them. And when all admit, as is done here, that they are honest and intelligent and faithful men, in whom all confidence is to be placed, their award is not to be disturbed on doubtful testimony.

On this rule to show cause, two of the commissioners, David Ryerson and Nathan A. Shafer, have been examined; and after attending to the various opinions of others on the subject, they are sensible of no error, but are entirely satisfied with the report. They, and especially Mr. Ryerson, have given their reasons at large, for dividing the property as they have done; and with those reasons I am not dissatisfied.

I do not find it necessary to scan the testimony with as much nicety, as a judge would do on a rule to show cause why a verdict should not be set aside. This cause rests on a different principle. On rules to show cause the court is to say whether the jury did right from the evidence before them. Here the commissioners did not form their opinion on this testimony. They viewed the property. They formed their judgment from their own view and knowledge. The law trusts to their judgment and discretion, and their proceedings must stand, unless found clearly to be erroneous.

Such being the opinion of the court, it is unnecessary to advert to the other points raised by the counsel against the rule.

Let the rule to show cause be discharged, and the report stand confirmed.

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A.

ACCOUNT.

In all matters of account in equity, it is the peculiar right of the party who seeks the account, to examine the accountant under oath, and thereby test his conscience as to facts and circumstances material to the investigation of truth and the ends of justice. *Jakson* v. *Jackson's Ex'rs*, 96

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ADMINISTRATION. Vide EXECUTORS AND ADMINISTRATORS.

ADMINISTRATOR. Vide EXECUTORS AND ADMINISTRATORS.

ADVERSE ENJOYMENT. Vide WATER COURSE, 3.

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AGREEMENT.

1. Equity will not lend its aid to carry into effect an imperfect or doubtful agreement. *Robeson* v. *Hornbaker*, 60
2. The general rule is, that every agreement of which there should be a specific performance, ought to be in writing, certain and fair in all its parts, and for adequate consideration. *ib.*
3. The court will not refuse its decree for specific performance, merely because the agreement doth not state in what township, county or state the lands agreed to be conveyed, lie, provided the description of the premises is not thereby rendered altogether indefinite. *ib.*
4. Reasonable certainty in the description is all that is required; and it is not material in what way the requisite certainty is attained. *ib.*
5. The agreement of a feme covert, with the assent of her husband, for the sale of her real estate, is absolutely void at law, and courts of equity never enforce such a contract against her. *Wooden* v. *Morris*, 65
6. A decree for the specific performance of a contract, will not be refused on the ground that the purchaser was intoxicated at the time of the sale, unless it appear that such intoxication was produced or procured by the vendor, or that an undue advantage had been taken

of the situation of the purchaser. *Pittenger's Adm'r* v. *Pittenger*, 156

AMENDMENT. Vide PLEADING, 16.

ANSWER. Vide PLEADING, III.

APPEAL. Vide ORPHANS' COURT, 6.

ASSIGNMENT AND ASSIGNEE.

1. If a debtor execute an assignment under the statute of New-Jersey, for the benefit of his creditors, annex thereto an inventory of his property and a list of his creditors under oath, and deliver it to the assignee, who receives it, understanding its objects and effect; the act of the assignor is complete, and he is divested of his estate, although the deed were not acknowledged. A trust is created, and the beneficial interest vested in the creditors, the *cestui que trusts*, though they knew nothing of it. *Scull* v. *Reeves*, 84
2. There is no particular formality necessary to the acceptance of a trust. If a person actually consent, or if he go to the property and exercise any power or right over it, it may be considered an acceptance, and especially when the rights of third persons are interested. *ib.*
3. It is not necessary that there should be an actual consent either in writing or by parol; acts fairly implying a consent are sufficient. *ib.*
4. An assignee is at liberty to refuse to act: no man can be made a grantee against his will. *ib.*
5. If one of two assignees refuses to act, the trust is not thereby destroyed, but the whole estate vests in the other, and he alone is competent to execute the trust. *ib.*
6. If the deed of assignment be executed and delivered, and the trust accepted, the trustee cannot, by surrendering or cancelling the deed, destroy the trust, or impair the rights of the *cestui que trusts*. *ib.*
7. If a deed made by a debtor for the benefit of his creditors, has once taken effect, the cancellation or destruction of the deed, either fraudulent or accidental, cannot affect the rights of the parties; nor has the grantor power to revoke it. *Scull* v. *Reeves*, 131
8. The fact that one of the assignees renounced in writing, and that the other one relinquished the trust by giving up the deed of assignment, presents no serious obstacle to the execution of the trust. It is in the hands of the court, to be executed under its direction, according to the law and the intention of the parties, and the court will see that it is properly done. *ib.*
9. That the grantor was under some misapprehension as to the mode and time of making sale of his property, and that he was ignorant of some of the requirements of the statute and the duties of the assignees, will not operate to set aside the deed *ib.*

10. The trust will be carried into effect, although a compliance with all the directions of the statute, in regard to the proceedings of the assignee, as to matters rather of form than substance, is impracticable. *ib.*

11. An assignment by operation of law passes the rights of an insolvent in the same plight and condition that he possessed them. *Van Doren v. Todd*, 397

Vide LEGACY, 1. MORTGAGE, II. VENDOR AND PURCHASER, 11, 12.

B.

BANKS. Vide CORPORATIONS, 1—10.

BILL. Vide PLEADING, II.

C.

CANCELLATION. Vide ASSIGNMENT AND ASSIGNEE, 6, 7.

CAPACITY. Vide TESTAMENTARY CAPACITY.

CORPORATIONS.

1. Where the first election of directors of a bank is authorized to be held upon a call made by commissioners appointed by the act, it is not essential that the call should be the result of any formal order of the commissioners. *Hardenburg v. Farmers and Mechanics' Bank of New-Brunswick*, 68

2. Where the original notice is in the hand-writing of the secretary of the commissioners, he being one of them, and the names of the other commissioners are signed by him, if the notice is published and in no way disavowed by the commissioners, it will be deemed their act. *ib.*

3. After the organization of the company by the stockholders, the powers of the commissioners are at an end. *ib.*

4. The commissioners cannot, after having advertised a meeting of the subscribers for the choice of officers, as specified in the act, adjourn or postpone the election at their pleasure. *ib.*

5. The subscribers acquire under the notice a right to hold the election at the time appointed, and to come into possession of the property they have invested, and as a general rule, the commissioners have, after that, no right to interfere against the will of the subscribers. *ib.*

6. If the commissioners, after calling a meeting of the subscribers, order the election postponed, and the subscribers, nevertheless, refuse to postpone, and proceed with the election; the election will not be thereby avoided, unless in the opinion of the court a postponement was clearly necessary. *ib.*

7. But if any considerable number of subscribers had been deprived of their elective franchise in consequence of the postponement, would the election be avoided?—*Quære.* *ib.*

8. The commissioners have a right to the custody of the money paid into their hands; but if their treasurer wrongfully withhold it from them, that is no ground for postponing an election by the stockholders. *ib.*

9. The court cannot set aside an election for a mere irregularity, nor because the expenses of the commissioners were not paid. *ib.*

10. To authorize an injunction to prevent an installment being paid in, the court ought to be satisfied that the election was entirely without authority, and void. *ib.*

11. In the Reformed Dutch Church, under the statute of New Jersey incorporating religious societies, the civil office of trustee grows out of the ecclesiastical office of minister, elder, or deacon. Every minister, elder, or deacon, properly called and instituted, is, *virtute officii*, a trustee, and must necessarily remain such as long as his ecclesiastical office continues. *Doremus* v. *Dutch Reformed Church*, 332

12. Ministers, elders, or deacons, lawfully elected and ordained, and thus inducted into office, though they afterwards secede, renounce the authority of the classis and general synod, and unite with another ecclesiastical body, do not thereby divest themselves of their offices. *ib.*

13. There must be a removal or amotion, by a competent power, to determine an office. *ib.*

14. If there be a resignation, the resignation must be accepted; and if there be an absolute vacation of an office, such vacation must be recognized and acknowledged. *ib.*

15. When the original title of an office is sufficient, though good cause of amotion be shown, even in a case where the charter declares that for such cause of amotion the officer shall vacate his office, the office is not determined until there be an amotion. *ib.*

16. When persons are officers *de facto*, they are in *colore officii*, and their acts will be valid until they are lawfully ousted; and more especially as they respect third persons, their acts are binding on the corporation. *ib.*

17. Is a court of equity the proper tribunal in which to try the question of forfeiture of office?—*Quere.* *ib.*

Vide FRAUD, 1—7.

COSTS.

1. The costs of an issue at law directed by a court of equity, do not follow the verdict as of course, but are in the discretion of the court. *Decker* v. *Caskey*, 446

2. A mortgagee, upon a bill for foreclosure, allowed his taxed costs of an issue at law directed by the court, to try the mortgagor's title to a

part of the mortgaged premises, although the verdict at law was adverse to the claim of the mortgagor; such costs being, in the opinion of the court, expenses properly incurred in the recovery of the mortgage money. *ib.*

3. It is usual to allow the costs of both parties incurred in contesting a will to be paid out of the personal estate, except where it appears that the conduct of one or other of the parties is frivolous, oppressive or fraudulent. *Day* v. *Day*, 549
4. Counsel fees should also be allowed to the executor, who offers the will for probate, and in proper cases counsel fees may be allowed to both parties out of the estate. *ib.*
5. Where there is a fair ground for re-examination, costs ought not to be awarded against the appellant, though the decree be affirmed. *Goble* v. *Grant*, 629

D.

DEBTOR AND CREDITOR.

1. Where the creditor has two funds, one separate and one in common with others, he must first look to his separate security, and after that is exhausted he may look to the fund in which others are interested. *State Bank* v. *Receivers of the Bank of New-Brunswick*, 266
2. Attaching creditors do not stand on the same footing as *bona fide* purchasers. The latter are entitled to protection on account of the payment of a present consideration without notice; but the rights of third persons are not affected by an attachment or a judgment, though the attaching or judgment creditor may not be affected with notice. *Depeyster* v. *Gould*, 474

Vide ASSIGNMENT AND ASSIGNEE, 1, 7. RECEIVERS, 4.

DECREE. Vide PRACTICE, V. FRAUD, 9.

DEED.

1. If a deed made by a debtor for the benefit of his creditors has once taken effect, the cancellation or destruction of the deed either fraudulent or accidental, cannot affect the rights of the parties; nor has the grantor power to revoke it. *Scull* v. *Reeves*, 131
2. When a deed is executed by the grantor, and deposited with a third person until the grantor shall have an opportunity of acknowledging it, and then to be delivered to the grantee; it is not an escrow, nor can the grantor avoid the deed by refusing to acknowledge it. *White's Adm'rs* v. *Williams*, 376

Vide EVIDENCE, 7.

DEMURRER. Vide PLEADING, IV.

DEVISE. Vide DOWER, 1.

DISTRIBUTIVE SHARE. Vide EVIDENCE, 3, 4.

DOWER.

1. A devise to the widow of the use and enjoyment of two rooms and of the kitchen and cellar, during her natural life, is a devise of real estate for her life, and the widow is not entitled to dower unless she shall express her dissent in writing to accept the devise. *Morgan* v. *Titus*, 201
2. The right of the widow to retain possession of the homestead, does not attach where there is no dower to be assigned. *ib.*

Vide ELECTION.

E.

EASEMENT. Vide WATER COURSE, 3.

ELECTION.

1. To constitute an election by a widow to accept a legacy bequeathed to her in lieu of dower, there must be something more than a mere intention or determination to elect. *English* v. *English's Ex'rs*, 504
2. A declaration of such intention, even if made to those interested, will not of itself constitute an election at law. *ib.*
3. There must be some decisive act of the party, with knowledge of her situation and rights, to determine the election, or an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons. *ib.*
4. Signing a petition to the legislature for a sale of the real estate of the testator, to enable the executors to pay the legacies and execute the various trusts mentioned in the will, if the petition was never acted on, will not constitute a legal election. *ib.*
5. Nor will the fact that an answer to a bill in chancery was filed in her name, assenting to a decree for the sale of the real estate of the testator, to carry into effect the trusts of the will, (one of which was the payment of the annuity bequeathed to the widow in lieu of her dower,) and a decree made for such sale, constitute an election, if it appear that she was merely quiescent in the matter, and that the answer as filed was neither signed nor assented to by her. *ib.*

EQUITY OF REDEMPTION. Vide MORTGAGE, III.

ESCROW. Vide DEED, 2.

EVIDENCE.

1. The declarations of a mortgagee, or his executrix, made after parting with all interest in the mortgage, cannot affect the rights of the assignee. *Kinna* v. *Smith*, 14

2. Parol evidence is admissible to prove identity, or shew a mistake in the name of a legatee. *Evans* v. *Hooper's Ex'r*, 204
3. On a bill praying a distributive share of the estate of an intestate, the court should be satisfied not only that the complainant is entitled to a part of the property, but also to what part of it he is entitled. *Delany* v. *Noble*, 441
4. The complainant must prove affirmatively that he is entitled as one of the next of kin, and negatively that there are none others who are entitled, except those whose rights he admits. *ib.*
5. To examine a witness more than once without leave, is opposed to the policy not only, but to the rules and practice of the court. *ib.*
6. But if the opposite party do not object to the evidence thus taken, it does not lie in the mouth of the party offering it to call it in question. *ib.*
7. The receipt in a deed is not conclusive, and where an actual question is raised as to the payment of the consideration, parol evidence may be resorted to, to shew by whom it was advanced. *Depeyster* v. *Gould*, 474
8. The law expects from the subscribing witnesses to a will peculiar care, caution and circumspection. *Sloan* v. *Maxwell*, 563
9. The mere opinions of witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them, in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing. *ib.*
10. Whenever the formal execution of a will is duly proved, he who wishes to impeach it on the ground of incompetency, must support by proof the allegation he makes, and thereby overcome the presumption which the law raises of the sanity of the testator. *ib.*
11. An omission made by a scrivener in preparing a will of real estate, cannot be supplied by parol evidence. *Andress* v. *Weller*, 604
12. It seems that an omission made in preparing a will of personal estate, may be supplied, or a mistake corrected, by parol proof of the omission, aided by the written instructions to the scrivener, but not by parol evidence alone. *ib.*

Vide PLEADING, III., 38, 42, 43. TESTAMENTARY CAPACITY, 7. TRUST AND TRUSTEE, 3, 4. WILL, 1—5.

EXCEPTIONS (TO RECEIVERS' ACCOUNTS.) Vide PRACTICE, IV.

EXECUTORS AND ADMINISTRATORS.

1. Executors and trustees, while acting faithfully in the discharge of their duty, ought in no case to be losers. *Vanderpool* v. *Davenport's Ex'r*, 120
2. Legatees cannot call upon the administrator of the executor of the will for the payment of legacies. Such administrator must account

with an administrator de bonis non of the testator, and the administrator de bonis non must account with the legatees. *Boulton* v. *Scott's Adm'rs*, 231

2. The balance of assets remaining in the hands of executors after payment of debts, should either be paid to those interested, or be put out at interest for their benefit. *King* v. *Berry's Ex'rs*, 261

4. If the funds are used by the executor, he is required not only to pay interest, but to account for all the profits he may have made. *ib.*

5. If no profit has been made, but the money has been suffered to lie idle, he will be charged with simple interest for his negligence. *ib.*

6. The executor will not be exempted from the payment of interest, simply on the ground that the legatees were at a distance, and might call for their money when it was not in hand. *ib.*

7. In cases of manifest error it will not excuse an executor, that he acted on the advice of counsel; but in doubtful cases, it is a circumstance entitled to great weight in his favor. *ib.*

8. Where the exact line of duty was not clear; where the executor has acted in good faith, and under the advice of experienced counsel, and has not attempted to make any profit to himself, interest ought not to be charged against him. *ib.*

9. It is the privilege of executors and trustees to take counsel when any difficulty occurs as to their duty, and counsel fees will be allowed out of the estate. *ib.*

10. Travelling expenses incurred by an executor are not a lawful charge against an estate: expenses of that kind must be taken out of the commissions. *ib.*

11. Executors are not necessarily liable for each other's acts, or responsible for the money which comes to each other's hands. *Fennimore* v. *Fennimore*, 292

12. As a general rule, each executor is answerable for no more than he receives. *ib.*

13. Where a testator by his will directs that if either of his executors, at public sale, purchase any part of his real estate, the other executor shall execute a deed conveying the land so purchased, either of the executors has a right to purchase, and the other is bound to execute the necessary conveyance. *ib.*

14. The purchaser may retain the purchase money in his own hands as assets, and his co-executor can neither compel him to pay it nor to give security for its payment as a condition of executing the deed. *ib.*

15. It has been repeatedly decided in this court, that where executors account jointly, without specifying the amount of receipts and disbursements by each, and showing the balance in each one's hands, they are all concluded and bound. Does this principle prevail?—*Quære.* *ib.*

16. After a general settlement is made by executors or administrators

in the usual way, the orphans' court have no power to adjust difficulties between them respecting their receipts and disbursements. These are private matters, over which the court has no jurisdiction. *ib.*

17. Where executors exhibit a joint account, and connected therewith a separate account showing the receipts and disbursements of each executor, and the court decree an allowance of the account as stated, the joint account must be considered as qualified and explained by the separate one. *ib.*

18. If the collection of a debt due an estate is neglected by the executors for three years, and the debtor then fails, the executors will be held accountable for the amount. *Stark* v. *Hunton*, 300

19. If the executors, in their discretion, are satisfied that there is nothing due the estate upon a claim included in the inventory and appraisement, they will not be charged with the amount unless it be made to appear that the amount was really due. *ib.*

20. If the executor take no step for two years for the recovery of a note, and the maker becomes insolvent, such negligence will charge the executor. It cannot be reconciled with good faith or the exercise of a sound, reasonable discretion. *ib.*

21. If an executor, without inquiry or examination, pay a claim against the estate where nothing is really due, he will be charged with the amount. *ib.*

22. An executor, who was also an agent or trustee of the testator in his life time, after the final settlement of his accounts as executor in the orphans' court, cannot be called on to account in equity as such trustee. There can be no separate accounting in the two different capacities. *Vanmeter* v. *Jones' Ex'r*, 520

23. The inventory presented to the surrogate by an executor, should contain a specific enumeration of the goods, chattels and credits of the testator; a paper containing items, thus—"cash, bonds and notes"—"household goods and kitchen furniture"—is not, strictly speaking, an inventory, and may properly be rejected as such by the surrogate. *ib.*

24. Where letters of administration are revoked as informally or illegally granted, new letters may be granted to the same person, or, it seems, to any other, without a new application. *Delany* v. *Noble*, 559

25. Filing a caveat against the probate of a will by one of the executors named therein, is not an implied renunciation of the executorship; and if the will be admitted to probate, letters testamentary may be granted to such executor. *Maxwell's case*, 611

26. An executor is not lightly, or by slight or indirect circumstances, to be precluded from the trust the testator intended to confide in him. *ib.*

27. The granting of probate, and the issuing of letters testamentary to one or more of several executors, are not a bar or preclusion of the subsequent administration by the others. *ib.*

28. It seems otherwise, at least by the practice of the English courts, where all the executors have refused to act, and administration has been granted. *ib.*

29. Where a will is admitted to probate, an executor named therein, if capable in law, is not to be excluded, unless he has by some act of his own deprived himself of the executorship. *ib.*

30. If the decree of the court admitting the will to probate, direct that letters testamentary be issued to one of the executors, it will not preclude the subsequent granting of letters testamentary to the other executor. *ib.*

31. Where a will has been admitted to probate by a decree of the prerogative court, it is neither requisite nor proper to insert in the oath of the executor the usual clause, that the will is the true last will and testament of the decedent. *ib.*

F.

FEIGNED ISSUE. Vide ISSUE.

FEME COVERT. Vide AGREEMENT, 5.

FRAUD.

1. The act, entitled, "An act to prevent frauds by incorporated companies," passed the sixteenth of February, 1829, applies to incorporated companies whose charters were then in force, and in which there was no reservation to the legislature of a right to alter, modify or repeal the same. *Suydam* v. *Receivers of the Bank of New-Brunswick*, 114

2. The act regulates, rather than gives jurisdiction to this court. *ib.*

3. Enactments of the kind contained in this statute, though retrospective in their operation, are not in a legal sense *ex post facto*. These terms, in legal phraseology, refer to crimes, pains and penalties. *ib.*

4. Receivers appointed under the act may, in their discretion, on the ground of expediency, ratify a sale made by the company after insolvency, or a suspension of its business for want of funds, though such sale is declared by the act null and void as against creditors. *ib.*

5. A claim which cannot be allowed as a set-off under the act to enable mutual dealers to discount, may nevertheless be allowed as a set-off by receivers, under the act to prevent frauds by incorporated companies. *State Bank* v. *Receivers of the Bank of New-Brunswick*, 266

6. The act entitled "An act to prevent frauds by incorporated companies," partakes largely of the character of a bankrupt law. The general object of the act and the provisions made to effect it are es-

sentially the same as the bankrupt law; and it seems proper to apply to it the general rules that govern the bankrupt system where it is in use. *ib.*

7. The act does not confine itself to *legal* set-offs, but refers to *just* set-offs, and expressly directs the receivers to allow them when they ought to be allowed according to *equity*. It gives to receivers an equitable power, and they are to exercise it according to the justice of the case. *ib.*

8. Mere inadequacy of consideration is not of itself a distinct principle of relief. But palpable and excessive inequality in a bargain, or inadequacy of consideration so gross as to shock the conscience, will induce equitable interference on the ground of fraud. *Wintermute's Ex'rs* v. *Snyder's Ex'rs*, 489

9. When and under what circumstances may fraud operate to impeach a decree? Will fraud in the incipient stage of a transaction be sufficient to overturn a decree subsequently obtained, when the party complaining of it was apprised of the facts on the trial, and had within his power the means of investigation; or is it to be confined to fraud in procuring the decree?—*Quære*. *Vanmeter* v. *Jones' Ex'r*, 520

10. In cases of family agreements and compromises, there must always be a mutual trust and confidence between the parties; and if there is any concealment of material facts, the compromise will be held invalid. *ib.*

Vide JURISDICTION, 3, 13, 19. PRACTICE, IV.

G.

GUARDIAN AND WARD.

1. Upon the father's death, the mother succeeds him as guardian by nature of her minor child; but when a testamentary guardian is constituted by the father, the natural right of the mother must yield to the will of the father. *Vanhouten's case*, 220

2. To take away from the mother this natural right, the father's intention should be manifest. *ib.*

3. Testamentary guardians stand *in loco parentis*, and supersede guardians appointed by the orphans' court. *ib.*

4. A testator, after giving the residue of his estate to his infant son, ordering his executors to invest the personal estate and the proceeds of his real estate for his benefit, directs as follows: "I do further order that my executors give unto my said son, A. V. H., out of my estate, a good college education and a decent support until he arrive at the age of twenty-one years." *Held*, that the right and power of directing the education of the infant is vested in the executors, and that they are entitled to the custody of his person so far as is necessary and proper for the purposes of education. *ib.*

H.

HUSBAND AND WIFE. Vide AGREEMENT, 5. PLEADING, IV.

I.

IDIOTS AND LUNATICS.

1. Reasonable notice of the time and place of taking an inquisition of lunacy, should be given to the alleged lunatic; and the want or defect of notice is not aided by his appearing before the jury and attempting a defence. *Whitenack's case*, 252
2. An inquisition of lunacy taken without due notice, will be set aside, and a new commission awarded. *ib.*

INFANT.

1. The lands of an infant may be sold for his benefit, and the property changed from real to personal, under the authority and direction of the legislature, without regard to the interests of real or personal representatives. The validity of the title under such sale does not depend on the assent of the infant: he cannot disaffirm the sale on coming of age. *Snowhill v. Snowhill*, 20
2. Courts of equity may, and frequently do, change the character of property belonging to infants or lunatics. They will permit trustees or guardians to do it where it is manifestly for the advantage of the owner, without reference to the contingent interests of real or personal representatives. *ib.*
3. The authority of the legislature to convert the property of an infant from real to personal, cannot be questioned; and where there is no breach of trust, or violation of good faith, or sinister design, on the part of the guardian who applies for the law, the act cannot be impeached. *ib.*
4. Where the property of an infant is changed by authority of a competent tribunal, from real to personal, it will, upon the death of the infant, go to his personal representatives. *ib.*
5. Where there has been a breach of trust, as where the trustee or guardian has abused the trust, and changed the quality of the estate to subserve his own interest, there arises an equity to undo the act in favor of the person whose rights are injured. *ib.*
6. But there is no equity between the personal representative and the heir, as such. They are both volunteers: each must take what they find at the death of the person entitled for life, in the condition in which they find it. *ib.*

Vide GUARDIAN AND WARD.

INJUNCTION.

I. In what cases and when granted.

II. To stay Waste, Trespass or Nuisance.

III. To stay Proceedings at Law.

IV. Dissolving Injunction.

V. Form and Operation of the Injunction.

I. In what cases and when granted.

1. A trivial or unimportant interference, such an one as does not sensibly and plainly interrupt the complainant's enjoyment, will not call for or warrant the restraining power of a court of equity. *Shreve* v. *Voorhees*, 25
2. As against a riparian owner seeking to erect an improvement on his own land, the complainant ought to show that his superior rights have been or will be, not probably, but really and sensibly affected. *ib.*
3. A bill brought to establish a legal title, and for a perpetual injunction, will be dismissed. The trial must be at law. The court will interfere by injunction only after repeated trials at law, and for the sake of preventing useless litigation. *De Groot* v. *Receivers of the Washington Banking Co.* 193
4. It is a general rule, that the party seeking to be protected by injunction in the possession or enjoyment of real property, must show a right, and such a right as the court will feel bound upon his own showing to protect against the act of the defendant. *Outcalt* v. *Disborough*, 214
5. In applications for injunctions to stay waste, the rule is strict. In such cases the parties generally claim under adverse rights; and unless the complainant will show a sufficient title in himself, the court will not interfere, but leave him to his legal remedy. *ib.*
6. But where the gravamen of the case is, that the defendant fraudulently purchased the property of the complainant, if the complainant's right is stated in such way as to authorize him to come in and complain of the fraud, and entitle him to relief against it, it is sufficient. *ib.*
7. If an injunction is prayed for in the bill, but is omitted in the prayer for process, an injunction ought not to issue without an amendment of the bill. *Bailey* v. *Stiles*, 245
8. When new works are to be erected on an old possession, (the right of the complainant having been established,) equity will restrain. *Quackenbush* v. *Van Riper*, 350
9. The writ of injunction is not used to restrain any possible interference, however small, with the complainant's rights. *ib.*
10. If the proprietor of land, by building a mill and raising a head of water on his own land, is about to cause serious and irreparable dam-

age to his neighbor's property, equity will restrain him: but if the injury is comparatively small, and may be compensated in damages, an injunction ought not to issue. *ib.*

11. An injunction will not issue for the prevention of every trespass or infringement of right, where a suit at law might be brought. *ib.*

12. A party having established his right at law, stands, in regard to trespasses, and injuries of that character, in no better situation than one whose right is not disputed. Neither is entitled to protection by injunction unless the injury is serious, permanent and destructive of the estate. *ib.*

13. A public officer, acting under the process of this court, will not be restrained for the purpose of aiding the complainant in a proceeding in a court of law, which, in the opinion of the chancellor, is unlawful or unnecessary. *Haight* v. *Bergh's Ex'rs*, 356

14. Equity will not, in the absence of special circumstances, interfere by injunction to protect a legal right, which may be tried at law. *Wooden* v. *Wooden*, 429

15. The operations of large companies should not be arrested by injunction, without notice, except in very plain cases, or where there is a pressing necessity for immediate action. *Capner* v. *Flemington Mining Co.* 467

Vide CORPORATIONS, 10.

II. To stay Waste, Trespass or Nuisance.

16. The ancient doctrine of the court of chancery was, not to interfere by injunction in cases of trespass, but to leave the party to his legal remedy. The practice of the court is now more liberal; yet in cases of trespass it still expects a strong case of destruction or irreparable mischief to be presented. *West* v. *Walker*, 279

17. Cutting off the timber from a tract of pine land, valuable only or chiefly for the wood upon it, is not such a case of irreparable mischief as will warrant the granting of an injunction. *ib.*

18. Nor will the court interfere by injunction though the bill charges that the actual trespassers are poor and unable to respond. *ib.*

19. The rule formerly was that a complainant, by stating an adverse claim to the property, stated himself out of court. This is not now the case to the same extent as formerly; but where the complainant by his bill discloses a claim on the part of the defendant, and whence derived, he shows that there is a conflict in the title, and furnishes an additional reason why the court should not interfere in matters of trespass where no remediless injury is likely to be sustained. *ib.*

20. In cases of trespass or nuisance, an injunction will not be granted, unless the injury about to be committed is of a serious, permanent and irreparable character, such as cannot well be compensated in damages, and which therefore requires the extraordinary power of chancery to prevent its commission. *Van Winkle* v. *Curtis*, 423

21. Where it appears that the stream, a part of which is sought to be diverted, runs through a corner of the complainant's farm, a quarter of a mile from his dwelling; that it runs through low, swampy, marshy ground, and is not nor has ever been applied to any practical use, equity will not interfere by injunction to prevent the diversion. *ib.*

22. A charge of waste, whereby the mortgage security is diminished, is always a sufficient ground for an injunction as between mortgagor and mortgagee. *Capner* v. *Flemington Mining Co.* 467

23. Where a farm has been purchased and is occupied for mining purposes, any necessary or proper use of the property in mining operations is not waste. *ib.*

24. In all cases of waste or nuisance, it must appear clearly that the party has personal knowledge of the material facts charged, or he must produce supplemental proof to warrant an injunction. *Perkins* v. *Collins*, 482

Vide INJUNCTION, I. 10—12. PLEADING, 29—31.

III. To Stay Proceedings at Law.

25. The statute (*Rev. Laws*, 704, sec. 6) which directs that an injunction shall not issue to stay proceedings in a personal action after a verdict or a judgment, on the application of the defendant at law, unless the amount of the verdict or judgment be first paid into court, applies as well to an interpleading bill, where an injunction is prayed, as to other cases. *Morris Canal and Banking Co.* v. *Bartlett*, 9

26. An injunction issued to restrain proceeding in attachment against a non-resident debtor, for the recovery of a judgment debt, at the instance of the defendant in attachment, will be dissolved, unless the amount of the judgment be deposited with the clerk of this court before issuing the injunction. *Kinney* v. *Ogden's Ad'mr*, 168

27. The statute declaring that an injunction shall not issue to stay proceedings at law in any personal action after judgment, unless the amount of the judgment, with costs, be first deposited with the clerk of the court by the applicant for the injunction, if he be a defendant in the said proceedings at law, is not limited to proceedings in the same suit. *ib.*

28. The meaning of the statute is, that a party who has obtained a judgment shall not be stayed or hindered in any suit or proceeding he may institute for the recovery of it, unless the amount of the judgment be first deposited with the clerk of the court. *ib.*

IV. Dissolving Injunction.

29. If the answer of one of the defendants is not full and satisfactory as to any one of the grounds of equity set up in the bill, the injunction cannot be dissolved. *Scull* v. *Reeves*, 84

30. Where two defendants are implicated in the same charge, the court always requires the answer of both before dissolving the injunction, without some special reason to the contrary. *Price* v. *Clevenger*, 207

31. But the neglect or refusal to answer of any defendant not interested in the gravamen of the charge, will not affect the rights of parties really interested. *ib.*

32. An injunction granted on notice, and after hearing upon affidavits on both sides, and especially upon the affidavits of the defendants themselves, going to the merits, will not be dissolved on the answer of the defendants. *Sinnickson* v. *Johnson*, 374

33. Where the answer denies all the equity of the bill, the injunction to stay proceedings at law will be dissolved of course. *Wooden* v. *Wooden*, 429

34. If an injunction bill has been actually sworn to, the injunction will not be dismissed because the master has omitted to sign the jurat. *Capner* v. *Flemington Mining Co.* 467

35. Though the operations of large companies ought not ordinarily to be arrested by injunction without notice, yet it is a matter resting in the sound discretion of the court; and if a master, in the exercise of his discretion, has allowed the injunction without notice, the chancellor will not therefore, as of course, dissolve the injunction, although he might have exercised the discretionary power differently. *Perkins* v. *Collins*, 482

36. An irregularity in the bill or affidavit upon which an injunction is allowed, is not waived by filing an answer and moving to dissolve the injunction, if the answer is not relied on in support of the motion to dissolve. *ib.*

37. If an injunction is allowed upon an insufficient affidavit, it is not merely an irregularity, but an error, to which the principle of waiver does not apply. *ib.*

38. A deficiency in the verification of the charges in the bill, cannot be supplied upon the hearing of a motion to dissolve the injunction. *ib.*

V. Form and Operation of the Injunction.

39. The injunction is a preventive remedy; if the injury be already done the writ can have no operation, for it cannot be applied correctively so as to remove it. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong. *Attorney General* v. *New-Jersey Railroad and Transportation Co.* 136

40. When an injunction has been duly served on the defendants, they are personally responsible for a violation of the order of the court, in whatever capacity, or with whatever view they acted. *Quackenbush* v. *Vanriper*, 350

41. While a writ of injunction remains in force, its commands must be implicitly obeyed. The party injoined is not at liberty to speculate upon the intention, or question the authority of the court. *Richards* v. *West*, 456

42. An injunction should always be plain and certain on the face of it, so that the party may understand it without reference to the bill filed. *ib.*

43. If, on inspection of the bill, the injunction is found to be too broad, the defendant is not to abridge it at his discretion. His remedy is to apply for such a modification of it as is suited to the case made in the bill. *ib.*

INTEREST.

The true rule in computing interest is, that where partial payments are made exceeding the interest due, the surplus is to be deducted from the principal, and the balance forms a new principal on which to compute interest; but where the payments do not equal the interest due, no deduction is made, and the interest is cast on the principal until the payments exceed the amount of the interest. *Stark* v. *Hunton*, 300

Vide EXECUTORS AND ADMINISTRATORS, 3—8.

INTERPLEADER. Vide PLEADING, II.

INTOXICATION. Vide AGREEMENT, 6. JURISDICTION, 8—11. TESTAMENTARY CAPACITY, 6.

INVENTORY. Vide EXECUTORS AND ADMINISTRATORS, 23.

ISSUE.

1. The practice of sending ordinary matters to a jury for their decision, ought to be discouraged. But in important cases, where the evidence is so contradictory as to raise serious doubts on the mind of the court as to matters of fact, it is proper to direct an issue, or order a suit at law. *Bassett* v. *Johnson*, 417

2. Issue awarded, with special directions touching the conduct of the trial; and leave given for a special jury. *ib.*

Vide COSTS, 1, 2.

J.

JUDGMENT AT LAW.

1. The judgment of a court of common pleas, rendered in a proceeding by attachment against an absent or absconding debtor, though irregular and not pursuant to the statute, is not *void*, and cannot be impeached collaterally. *Diehl* v. *Page*, 143

2. The court has a general jurisdiction over the whole subject matter;

and although it acted under the requisitions of a particular statute, and not according to the course of the common law, it is not thereby degraded into a court of such inferior and limited jurisdiction as that all its proceedings while acting within its jurisdiction, are rendered void if a single requisition of the statute be not complied with. *ib.*

3. Chancery will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defence, or unless he was prevented from availing himself of the defence by fraud or accident, or the act of the opposite party, unmixed with negligence or fraud on his part. *Kinney* v. *Ogden's Adm'r*, 168

Vide JURISDICTION, 2—6, 19.

JUDGMENT CREDITOR. Vide DEBTOR AND CREDITOR. MORTGAGE, 20.

JURISDICTION (OF CHANCERY.)

1. The orphans' court and court of chancery have, to a certain extent, concurrent jurisdiction in reference to the accounts of executors, administrators and guardians; but in all cases where a party seeks relief on grounds peculiarly of chancery jurisdiction, and which call for the exercise of chancery powers, the jurisdiction of chancery is paramount. *King* v. *Berry's Ex'rs*, 44
2. In the exercise of the power of the court to relieve against fraud, the court will extend its aid for the relief of parties, whether the subject infected with fraud be a simple contract, a deed or a judgment. *Boulton* v. *Scott's Adm'rs*, 231
3. Judgments of courts of law are liable to be relieved against on account of fraud in the procurement of them, and the same principle applies to decrees or judgments of the orphans' court. *ib.*
4. The act declaring the sentences and decrees of the orphans' court final and conclusive, only places them on a footing with the judgments of other courts, and does not at all interfere with or abridge the jurisdiction of the court of chancery over the same subject matter. *ib.*
5. It is not enough that the orphans' court may have erred in judgment as to a subject matter properly before them; they must have been led into error by some fraudulent and unconsciencious act or omission of the party to be benefitted, or this court can take no cognizance of it. *ib.*
6. It is not the province of a court of equity to review the sentences or judgments of other tribunals, to ascertain whether they have erred in the exercise of their judicial power and discretion in matters over which they had complete jurisdiction. *ib.*
7. Where a party knows that a bank has refused, from inability, to redeem its bills, he must be presumed to know of their inability to dis-

pose of their property; and if, with such knowledge, he contract with the bank for the purchase of property, he has no equitable claim to the consideration of the court. *Suydam* v. *Receivers of the Bank of New-Brunswick*, 276

8. A court of equity will hear a party who seeks relief against his own act on the ground of intoxication, though formerly such hearing was denied. *Hutchinson* v. *Tindall*, 357

9. To avoid a contract on the ground of intoxication it must be shown, either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation. *ib.*

10. If a person while in a state of intoxication, though not induced by the act or procurement of the grantee, execute an absolute conveyance of his property without consideration, equity will relieve against the conveyance. *ib.*

11. But if a person while intoxicated voluntarily execute a deed of trust for the benefit of his wife and childen, equity will not set it aside on the ground that undue advantage was taken of his situation. *ib.*

12. Mere inadequacy of consideration is not of itself a distinct principle of relief. But palpable and excessive inequality in a bargain; inadequacy of consideration so gross as to shock the conscience, will induce equitable interference on the ground of fraud. *Wintermute's Ex'rs* v. *Snyder's Ex'rs*, 489

13. So where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud. *ib.*

14. As a general rule, equity will not relieve against a contract merely on the ground that it was entered into by the parties under a mistake of the law. *ib.*

15. Where an instrument is drawn and executed, which professes and is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman either as to facts or law does not fulfill that intention, or violates it, equity will correct the mistake so as to produce a conformity in the instrument to the agreement. *ib.*

16. The mistake or ignorance for which a contract will be relieved against in equity, must be a mistake or ignorance of a material fact, essential to its character, and a material cause of its concoction. *Deare* v. *Carr*, 513

17. The fact must also be such as the party could not, by reasonable diligence, have gotten knowledge of, when he was put upon inquiry. *ib.*

18. When the fact is equally unknown to both parties, or when each has equal and adequate means of information, and both have acted in good faith, the court will not interfere. *ib.*

19. There can be no doubt of the power of the court of chancery to look into the judgments of other courts, and to set them aside on the ground of fraud. *Vanmeter v. Jones' Ex'r*, 530

20. The decrees of ecclesiastical courts, and of this court, will be relieved against or avoided on the same ground. *ib.*

21. The power and jurisdiction of this court over decrees of the orphans' court is not taken away or abridged by that clause of the statute of New-Jersey which enacts, that the sentence or decree of the orphans' court shall be conclusive upon all parties, except in certain specified cases, where the account may be opened by the court itself. *ib.*

22. A court of equity exercises the power of setting aside decrees of the orphans' court for fraud, not on the ground of concurrent jurisdiction, but by reason of an inherent authority, growing out of the principles and constitution of the court, and extending itself over judgments of courts of every description. *ib.*

Vide AGREEMENT, 1. CORPORATIONS, 17. INFANT, 1. NUISANCE. TRUST AND TRUSTEE, 7—9.

L.

LEGACY,

1. The claim to a legacy is essentially an equitable and not a legal claim, and the character of the right is not altered by making it cognizable in the common law courts. It is an assignable interest, and the assignment passes the whole right of the assignor. Is it barred by the statute of limitations?—*Quere*. *King* v. *Berry's Ex'rs*, 44

2. Where by the terms of the will the real estate is ordered to be sold, and the residue of the estate, real and personal is bequeathed, and directed to be paid after the payment of certain pecuniary legacies, which cannot be paid till a future time; the residuary legatees are entitled to an account, and to have the real estate sold and the proceeds applied in the course of administration, before the time arrives for the payment of the particular legacies. *Vanderpool* v. *Davenport's Ex'r*, 120

3. And if such appears to have been the intention of the testator, the court will order the residuum to be paid over to the residuary legatees, before the particular legacies are paid; but this will not be done at the expense of the executor, or at the hazard of his safety. *ib.*

4. In order to charge legacies on the land and to exempt the personal estate, there must be an expression of intention so clear as to admit of no reasonable doubt. *Vanwinkle* v. *Vanhouten*, 172

5. Land may be charged with the payment of legacies either by express words, or by implication; and if by implication, it must be a fair and satisfactory inference that such was the intention of the testator. *ib.*

6. In ascertaining the intention of the testator, when he has not charged his lands expressly with the payment of debts or legacies, we must be governed not only by the expressions of the will, but by the situation of the property disposed of, and of the person taking it. *ib.*

7. A general residuary clause, embracing real and personal estate, where nothing but pecuniary legacies are previously given, and where of course nothing else could be taken out of the real estate so as to constitute a residue, is not to be taken as full evidence that the legacies are to be charged on the land. But it is some evidence. It is a circumstance which, taken in connection with others, may satisfy the mind of the testator's intention. *ib.*

8. Residuary clauses are usually introduced to prevent an intestacy as to any part of the estate, and are construed accordingly. They generally follow specific devises, and conclude the will. But when the whole of a large estate, excepting two or three pecuniary legacies, is embraced in the residuary clause, and no where else, it is fair to infer that something more was meant than a bare prevention of intestacy. *ib.*

9. Such instances are not frequent, and when they occur may justly be considered as affording some evidence of the mind of the testator. It may be small, but it should have its weight. *ib.*

10. The fact that the legacy is a provision for a child, one of the heirs, and not a legacy purely voluntary, as to a stranger or one having no claims of nature or kindred, is a circumstance going to show an intention to charge the legacy on the land. *ib.*

11. So the fact, that the residuary legatees and the executors are the same persons, though not full evidence of an intention to charge the land, is a circumstance entitled to consideration in ascertaining the testator's intention. *ib.*

12. The fact that a part of the legacy is in consideration of lands of the legatee appropriated by the testator to his own use, is of great importance in ascertaining the intention of the testator, and a strong circumstance in favor of charging the land. *ib.*

13. Will any of the foregoing circumstances, standing alone, ascertain the intention of the testator to charge the land, with sufficient certainty to found a decree?—*Quere.* *ib.*

14. Where it appeared that there was a deficiency of personal assets; that the residuary clause, though not peculiar in itself, was peculiar in reference to the dispositions of the will; that the clause was better satisfied by charging the legacies on the real estate than by a different construction; that it was a provision for infant heirs, and not a mere voluntary legacy; and that the property of the legatees had been taken by the testator and mingled with his own estate to constitute a common fund for the benefit of the devisees, out of which a certain sum was to be paid to the legatees;—*held*, that the

intention of the testator was, that the legacies should be paid at all events, and that they were a charge upon the land. ib.

15. Where devised premises, charged with the payment of legacies, are in the occupancy and enjoyment of a third person, other than the devisee, the tenant must account for the rents and profits to satisfy the legacies. The rents and profits must go in relief of the land. *Morgan* v. *Titus*, 201

16. That the real and personal estate are united together by the testator in the residuary clause, is not such a blending of them as to constitute one fund, and charge the land with the payment of legacies, except where there was no previous devise of real estate. *Parson* v. *Potts' Adm'rs*, 313

17. The circumstance that the devisees are also executors of the will, is not, of *itself*, sufficient to charge the land with the payment of legacies. ib.

18. Where a legacy coupled with a devise of real estate, is given to the widow in lieu of dower, her acceptance of the provision will not create an equity in her favor to charge her legacy on the land against other devisees. ib.

LENGTH OF TIME.

The lapse of twelve years between the last payment on a bond and the commencement of a suit for its recovery, is not such a length of time as to justify the appellation of a *stale demand*. *Kinna* v. *Smith*, 14

LIMITATIONS (STATUTE OF.)

1. Where a claim is barred by the statute of limitations, at the time of the testator's death, and the debt is to be satisfied out of the real estate, both the executors and the devisees have a right to avail themselves of the statute in defence, and no acknowledgment of the personal representative will bind the lands in the hands of the devisee. *Stark* v. *Hunton*, 300

2. But where a claim is not barred by the statute at the testator's death, though no proceedings are had against the heir or devisee within six years from the time the action accrued, the claim will not therefore be considered as barred by the statute, but shall be paid out of the proceeds of the land when sold for the payment of debts. ib.

Vide Legacy, 1.

LUNATICS. Vide Idiots and Lunatics.

M.

MASTER'S REPORT. Vide Practice, IV.

MISTAKE. Vide Jurisdiction, 14—18.

MORTGAGE.

I. Of the Mortgage generally.

II. Assignment and Registry of Mortgage.

III. Equity of Redemption, Foreclosure and Sale of Mortgaged premises.

I. Of the Mortgage generally.

1. A mortgage before foreclosure, is considered in equity as a chattel interest, and goes to the executor. *Kinna* v. *Smith*, 14
2. It may indeed be said, technically speaking, that the fee in the mortgaged premises descends to the heir at law; but he is a bare trustee for the personal representatives, and as a general rule he need not be a party to a bill filed by the executor for the foreclosure and sale of mortgaged premises. *ib.*
3. A mortgage deed contains the following description:—"All that certain tract or lot of land, situate in, &c., on the south-east side of the farm or plantation late the property of J. C. deceased; bounded on the S. W. by the public road leading from New-Brunswick to South river bridge, and N. W. by lands late Benjamin Tuthill's, deceased, N. E. by other lands of the parties of the first part, and on the S. E. also by other lands of the said parties of the first part, containing fifty acres; or the next and nearest adjoining thereto fifty acres of land, of and belonging to the said farm or plantation now in the joint or separate possession of the aforesaid James, Alfred and Edward Crommelin that is unincumbered, provided the first fifty acres herein described is in any way incumbered so as to defeat the title hereby made or intended to be made to the said Robert Lee." The mortgage is not void for uncertainty as to either of the tracts therein referred to. *Lee* v. *Woodworth*, 36
4. The whole farm is subject to the mortgage, and may be taken to satisfy it if necessary. A strip of fifty acres on one side is to be resorted to first; if that should be so incumbered as to defeat the title, or prove insufficient to raise the money, then the next adjoining fifty acres is to be resorted to, and so on by separate and adjacent parcels of fifty acres, until one is found not so incumbered as to defeat the title and claim of the mortgagee. *ib.*
5. A line drawn parallel to the south-east boundary line of the farm, so as to include fifty acres, will define with accuracy the first lot of fifty acres intended to be mortgaged. *ib.*
6. And the mortgage does not fail against the nearest adjoining fifty acres described as *unincumbered*, although the whole property should be incumbered. *ib.*
7. The first mortgagee is entitled to the possession of the mortgaged premises, and being in possession, there can be no receiver as against him. *Trenton Banking Co.* v. *Woodruff*, 210

8. And although the validity or existence of the first mortgage be disputed, the court will not appoint a receiver as against the first mortgagee, unless it appear that he is unable to respond for the rents. *ib.*

9. If a mortgage deed is prepared agreeably to the intention and instruction of the parties, reading it erroneously to the mortgagor before execution will not avoid it. *White's Adm'rs* v. *Williams*, 376

10. If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor or his representatives a good title, the mortgagee will be entitled in equity to the benefit of it. *Decker* v. *Caskey*, 446

II. Assignment and Registry of Mortgage.

11. The assignment of a mortgage, not being by deed, though it may not pass the legal estate, is nevertheless sufficient to transfer to the assignee all the equitable and beneficial interest in the mortgage, including the right to come into equity for relief. *Kinna* v. *Smith*, 14

12. It does not invalidate an assignment, that the subscribing witness to the assignment saw no money paid by way of consideration. If the assignment purports to be for value received, that is, *prima facie*, sufficient. *ib.*

13. A mortgage duly registered is notice to all the world, and if there be ambiguity on the face of it, it is sufficient to put subsequent purchasers upon inquiry. *Lee* v. *Woodworth*, 36

III. Equity of Redemption, Foreclosure and Sale of Mortgaged premises.

14. Where mortgaged premises are sold by the mortgagor in parcels to various purchasers, at different times, there can be no contribution among the purchasers. The older purchasers and their shares are exempt, until the younger ones and their shares shall have responded to the claim; and they must answer, respectively, in the order in which they have purchased, beginning with the youngest purchaser and ending with the oldest. *Britton* v. *Updyke*, 125

15. This order is to be observed, unless there are peculiar circumstances affecting the rights of parties, to change the rule. *ib.*

16. A suit for the foreclosure of a mortgage is not a personal action. It is a proceeding *in rem* against the land, not against the person of the debtor, and the defendant will not be permitted to set off any demand he may have against the mortgage debt. *White's Adm'rs* v. *Williams*, 376

17. Nothing can be set up against the incumbrance except payment, which operates directly as a release of the incumbrance, *pro tanto*. *ib.*

18. If a mortgage creditor becomes the purchaser of the mortgaged premises at sheriff's sale, under an execution issued upon a judgment rendered for the mortgage debt, the debt is extinguished to the amount of the purchase money. *Deare* v. *Carr*, 513

19. So if the debt be due to husband and wife, or to joint creditors, and one purchases the mortgaged premises at sheriff's sale under an execution for the debt, upon the acceptance of the deed the amount bid operates as a payment *pro tanto*. *ib.*

20. If a judgment creditor, having the judgment debt secured by a mortgage, becomes a purchaser of the equity of redemption subject to incumbrances intervening between his mortgage and judgment, through mistake or ignorance of the existence of his own mortgage, equity will not relieve. *ib.*

N.

NE EXEAT. Vide PRACTICE, 8.

NUISANCE.

1. A court of equity has jurisdiction to a certain extent in cases of public nuisance, although it has been rarely exercised. *Attorney General* v. *New-Jersey Railroad and Transportation Co.* 136

2. The common law courts have an undisputed jurisdiction over public nuisances by indictment, and a court of equity ought not to interfere in a case of misdemeanor, when the object sought can be as well attained in the ordinary tribunals. *ib.*

Vide INJUNCTION, II.

O.

OFFICE. Vide CORPORATIONS, 11—17.

ORPHANS' COURT.

1. A decree of the orphans' court, ordering an administrator to sell the whole or so much of the lands of the intestate as will be sufficient to pay the debts, will be reversed as erroneous and unlawful. But such decree cannot be impeached collaterally, or treated as a nullity. *Pittenger's Adm'r* v. *Pittenger*, 156

2. The decree of the orphans' court upon the final settlement of the accounts of administrators, adjudging that due and legal notice of such settlement was given, is final and conclusive, and this court cannot afterwards inquire into the fact of notice. *Boulton* v. *Scott's Adm'rs*, 231

3. The act declaring the sentences and decrees of the orphans' court final and conclusive, only places them on a footing with the judgments of other courts, and does not at all interfere with or abridge the jurisdiction of the court of chancery over the same subject matter. *ib.*

4. It is not enough that the orphans' court may have erred in judgment as to a subject matter properly before them; they must have been led into error by some fraudulent and unconsciencious act or omission of the party to be benefitted, or this court can take no cognizance of it. *ib.*

5. After a general settlement is made by executors and administrators in the usual way, the orphans' court have no power to adjust difficulties between them respecting their receipts and disbursements. These are private matters over which the court have no jurisdiction. *Fennimore* v. *Fennimore*, 292

6. A decree of the orphans' court, revoking letters of administration previously granted, and granting new letters to the same person, is within the provision of the twenty-first section of "An act to ascertain the power and authority of the ordinary and his surrogates," &c. (*Rev. Laws*, 782,) and an appeal from such decree must be taken within thirty days, although no new application for letters be made and no citations issued for parties to come in and be heard. *Delany* v. *Noble*, 559

P.

PARTIES. Vide PLEADING, I. PRACTICE, III.

PARTITION.

1. To justify the court in setting aside a partition of real estate on the ground of a mistake in judgment on the part of the commissioners, the mistake must be a serious one, and the evidence of it too plain to be mistaken. *Thomson's case*, 637

2. If the evidence be doubtful or contradictory, the report will be sustained. *ib.*

PLEADING.

I. Parties. II. Bill, Supplemental Bill, Bill of Interpleader, and Bill of Review. III. Answer. IV. Demurrer.

I. Parties.

1. It may indeed be said, technically speaking, that the fee in the mortgaged premises descends to the heir at law; but he is a bare trustee for the personal representatives, and as a general rule need not be a party to a bill filed by the executor for the foreclosure and sale of mortgaged premises. *Kinna* v. *Smith*, 14

2. Legatees who have assigned all their interest, are not necessary nor proper parties to a bill filed by the assignee for a recovery of the legacies. *King* v. *Berry's Ex'rs*, 44

3. A mortgagee who has assigned his mortgage by an instrument not under seal, and in whom the legal title to the mortgaged premises still remains, is not a necessary party to a bill of foreclosure filed by the assignee. *Parker* v. *Stevens*, 56

4. It seems that the rule requiring all the parties in interest to be before the court, is to be regarded rather as a rule of convenience; and where the legal right is entirely technical, and no beneficial purpose can be answered by enforcing the rule, it will not be followed. *ib.*

5. Where a bill is filed for a surplus or residuum to be paid after the payment of debts and legacies, or other prior incumbrances, the creditors, legatees or prior incumbrancers need not be made parties. *Vanderpool* v. *Davenport's Ex'r*, 120

6. And the rule is not altered, though the legacies are not to be paid immediately, and though a part of the residuum may by possibility be wanted to make up a deficiency arising from accident or loss happening before payment. *ib.*

7. But all persons interested in the residuum, though their interest depends on a remote contingency, must be made parties. *ib.*

8. No person against whom a decree cannot be had, should be made a party. *ib.*

9. Upon a bill for a legacy, if the lands charged with the payment of the legacy have been partitioned and are held in severalty, and the bill seeks to charge the balance due on the legacy upon one moiety of the land, which in equity is bound to satisfy it, it is unnecessary to make the owners of the other moiety of the land parties to the bill. *Vanwinkle* v. *Vankouten*, 172

10. On a bill filed by an heir, to avoid the deed of his ancestor, it is necessary that all the heirs of the grantor should be parties to the bill. *Young* v. *Bilderback*, 206

11. Where the new matter charged in a supplemental bill does not affect the rights or interests of a mere formal party to the original bill, it is not necessary to make him a party to the supplemental bill. *Allen* v. *Taylor*, 435

12. Where a suit is brought by a residuary legatee, for a settlement and distribution, all the residuary legatees, or their representatives, must be made parties. *De Hart* v. *De Hart's Ex'r*, 471

13. And the rule will not be dispensed with, though one of the residuary legatees has died, leaving his estate insolvent, and no administrator has been appointed. *ib.*

14. Where one of two co-executors has died, his representatives are not necessary parties to a bill against the surviving executor for settlement and distribution. *ib.*

II. Bill, Supplemental Bill, Bill of Interpleader, and Bill of Review.

15. On a bill to avoid a title as fraudulent, if it appear that the complainants have no title, they will not be permitted to impeach the title of the defendants. *Diehl* v. *Page*, 143

16. If an injunction is prayed for in the bill, but is omitted in the prayer for process, an injunction ought not to issue without an amendment of the bill. *Bailey* v. *Stiles*, 245

17. To entitle a party to file a bill in the nature of a bill of review, upon the ground of newly discovered matter, the evidence discovered must not only be new, but material, and such as if unanswered

in point of fact, would either clearly entitle the party to a decree, or would raise a case of so much nicety and difficulty as to be a fit subject of judgment in a cause. *Quick* v. *Lilly*, 255

18. A general creditor having filed his bill for relief, and having subsequently obtained judgment and execution at law, is not entitled to relief upon his original bill, though a decree *pro confesso* be taken against the defendant. A supplemental bill should be filed, stating the facts which entitle him to relief. *Edgar* v. *Clevenger*, 258

19. If a bill be so entirely defective that no decree can be made upon it, it will not be aided by a supplemental bill founded on facts that have subsequently taken place. *ib.*

20. But if the bill be sustainable on any ground, even for the purpose of granting temporary relief, the court having possession of the cause may hold it for the more general and important purposes of the bill, and will permit the complainant to file a supplemental bill. *ib.*

21. The complainant, in a bill of interpleader, sets out the claims as exhibited to him, and he cannot be expected to do it with as much particularity as the complainants themselves might do. It is enough for him to satisfy the court that there are opposing claims, against which he is in equity entitled to protection until they are settled, so that he may pay with safety. *Lozier's Ex'rs* v. *Van Saun's Adm'rs*, 325

22. A bill of interpleader may be filed, although the claim of one of the claimants is actionable at law, and that of the other in equity. *ib.*

23. It seems that a bill of interpleader will be sustained in cases where it is not absolutely necessary that the complainant should resort to equity for protection. *ib.*

24. It is no cause of demurrer to a bill of interpleader, filed by executors, that the bill prays relief, on the ground that the estate is likely to prove insolvent. *ib.*

25. The fact that the particular amount due is not ascertained, does not take from the executors the character of indifferent stakeholders. *ib.*

26. Nor is it a cause of demurrer to a bill of interpleader, that it is filed after judgment at law, no defence having been made against the recovery of judgment, where the whole or a part of the defence is equitable only. *ib.*

27. By delaying to file his bill until after judgment, the complainant subjects himself to the burthen of bringing the money into court, but is not deprived of his right. *ib.*

28. The bill of interpleader is not a proper remedy when the complainant has any personal interest in the question to be settled. *ib.*

29. The rule, that in injunction bills the particular title and interest of the complainant must be set forth, is more especially applicable to cases of waste. *Vanwinkle* v. *Curtis*, 422

30. But in cases of trespass and nuisance, the title and estate of the

complainant are set out with sufficient certainty in a bill for an injunction, if the complainant alleges himself to be the owner of the premises in fee simple by purchase, and to be in possession. *ib.*

31. A greater degree of precision in cases of trespass or nuisance is not required, especially where it is not alleged in the bill that the defendants make any pretence of right in themselves. *ib.*

32. A mortgagee having, before the mortgage debt became due, filed a bill to restrain the commission of waste upon the mortgaged premises, may, after the mortgage money becomes due, file a supplemental bill, setting out by way of supplement that the money has become due, and praying additional relief, viz. that the equity of redemption may be foreclosed and the mortgaged premises sold. *Allen* v. *Taylor*, 435

33. A strictly supplemental bill is always founded on facts that have occurred since the filing of the original bill. These may be necessary, either to aid the complainant in obtaining the relief sought, or in obtaining new or additional relief. *ib.*

34. A supplemental bill should be used in preference to an original bill, whenever it can equally subserve the purposes of justice. *ib.*

35. Where the new matter charged in a supplemental bill does not affect the rights or interests of a mere formal party to the original bill, it is not necessary to make him a party to the supplemental bill. *ib.*

36. It is not the practice to reiterate substantively in a supplemental bill, all the charges of the original bill, but to set them out by way of reference, and charge the new and additional facts by way of supplement. *Edgar* v. *Clevenger*, 464

37. Where the complainant in an injunction bill relies on his own oath, the charges in the bill, and the affidavit to verify them, should be direct and positive. They must not be such as can only be made sufficient by the aid of presumption. *Perkins* v. *Collins*, 482

Vide PRACTICE, I.

III. Answer.

38. Where the answer is directly responsive to the bill, and the defendant answers from his own knowledge, the answer must prevail unless overcome by the testimony of two witnesses, or by the testimony of one witness attested by strong corroborating circumstances equal to that of another. *Kinna* v. *Smith*, 14

39. If the answer of one of the defendants is not full and satisfactory as to any one of the grounds of equity set up in the bill, the injunction cannot be dissolved. *Scull* v. *Reeves*, 84

40. Where transactions are charged involving fraud, either actual or constructive, and especially where direct interrogatories are put in relation to particular facts, the court cannot be satisfied with a general answer, or one in any way evasive. *ib.*

41. An express denial in an answer of a fact of which the defendants admit themselves to be ignorant, is not a satisfactory denial of the complainant's equity. *Bailey* v. *Stiles*, 245

42. Where a deed is made absolute on the face of it, and without any actual consideration paid, if the grantor seeks to set it aside on the ground of fraud, the answer of the defendant setting up a trust, unless directly responsive to the bill, will not be evidence of the trust. *Hutchinson* v. *Tindall*, 357

43. But where the grantor files his bill claiming the deed to be a deed of trust, and the defendant by his answer admits it, the answer, it *seems*, will be good evidence of the trust, and a sufficient *writing* to support it. ib.

IV. Demurrer.

44. Where husband and wife file a joint demurrer, it may be overruled as to the husband and sustained as to the wife. It is not necessary that she put in a separate demurrer. *Wooden* v. *Morris*, 65

PRACTICE.

I. Filing Supplemental Bill and Bill of Review.

II. Motions, Notices, Hearing, Waiver, Ne Exeat, Application for Injunction, &c.

III. Taking Testimony, Affidavits, and Examination of Parties.

IV. Master's Report, Exceptions to Receivers' Accounts, and Practice under the act to prevent frauds by Incorporated Companies.

V. Opening Deceee.

I. Filing Supplemental Bill and Bill of Review.

1. The court will not, before granting leave to file a bill of review, inquire whether the petitioner can prove the facts set out in his petition. If the facts and matters set forth in his petition, verified by his own oath, are such as to lay a sufficient foundation for a bill of review, it is all that is required. *Quick* v. *Lilly*, 255

2. The party will be required to file his bill of review within a limited time, and to deposit with the clerk of the court at the time of filing the bill, one hundred dollars, as security for costs. ib.

3. It is irregular to file a supplemental bill without leave for that purpose first obtained of the court. *Allen* v. *Taylor*, 435

4. But where no objection has been taken to the regularity of the proceedings on this ground, it will be considered as waived by a voluntary appearance and demurrer by the defendants. ib.

II. Motions, Notices, Hearing, Waiver, Ne Exeat, Application for Injunction, &c.

5. When a motion is to be made to dissolve an injunction for want of equity in the bill, a general notice is sufficient. But when the party

seeks to set aside an injunction as having been informally or improperly issued, either because the facts are not sworn to, or not sworn to before competent authority, or because the money has not been brought into court, or for any special matter not touching the equity of the case, the notice should set out the grounds of the motion. *Morris Canal and Banking Co.* v. *Bartlett*, 9

6. Upon an application for an injunction, where notice is given, and the parties are heard upon the application, affidavits taken exparte, and without notice, may be read upon the hearing. *Hardenburg* v. *Farmers and Mechanics' Bank of New-Brunswick*, 68

7. If the bill be filed, the defendant may put in an answer, and use the answer on the hearing, not as an answer, but as an affidavit. *ib.*

8. A writ of *ne exeat* will not issue unless there is a debt due from the defendant to the complainant, or unless the complainant is entitled to an account. *Williams* v. *Williams*, 130

9. An irregularity in the bill or affidavit upon which an injunction is allowed, is not waived by filing an answer and moving to dissolve the injunction, if the answer is not relied on in support of the motion to dissolve. *Perkins* v. *Collins*, 482

10. If an injunction is allowed upon an insufficient affidavit, it is not merely an irregularity, but an error, to which the principle of waiver does not apply. *ib.*

11. A deficiency in the verification of the charges in the bill, cannot be supplied upon the hearing of a motion to dissolve the injunction. *ib.*

Vide IDIOTS AND LUNATICS.

III. Taking Testimony, Affidavits, and Examination of Parties.

12. The object of examining *a party* under oath, is to make a discovery of facts supposed to be within his knowledge, and of which the evidonce cannot be otherwise attained. *Jackson* v. *Jackson's Ex'rs*, 96

13. In all matters of account in equity, it is the peculiar right of the party who seeks the account, to examine the accountant under oath, and thereby test his conscience as to facts and circumstances material to the investigation of truth and the ends of justice. *ib.*

14. The mode of examination of a party in the English practice, is by written interrogatories, and there can be no cross-examination; but in New-Jersey the practice of oral examination, as well in relation to parties as witnesses, is universal; and the practice of cross-examination by counsel, it seems, is also universal. This practice approved by the court. *ib.*

15. A party before a master cannot be cross-examined generally. He cannot make evidence for himself, by the introduction of facts or matters not the subject of inquiry on original examination. He can only be called on to explain, or to make such statements as may pre-

vent misunderstanding, or rebut any unfair inference that may arise from the answer. ib.

16. To examine a witness more than once without leave, is opposed to the policy not only, but to the rules and practice of the court. *De Isny* v. *Noble*, 441

17. It is expedient, but not essential to the validity of an affidavit, that the place where the affidavit is taken should be inserted in the jurat. *Perkins* v. *Collins*, 482

18. The place of taking an affidavit is a matter *in pais*, and if legally questioned must be proved *aliunde*. ib.

IV. Master's Report, Exceptions to Receivers' Accounts, & Practice under the act to prevent frauds by Incorporated Companies.

19. The errors of a master, in permitting the cross-examination of the party to be extended to improper matters, does not necessarily vitiate the whole report. If the same result is fairly attainable from a view of the evidence without the aid of the erroneous examination, the report will be confirmed. *Jackson* v. *Jackson's Ex'rs*, 96

20. It is improper for a master in his report to argue the case upon its merits. The province of the master is to report facts, and not arguments, for the information of the court. ib.

21. By the English practice, exceptions to the accounts of a receiver as stated by a master, should be taken before the master, while the account is in his possession, and before he makes his report. *Mechanics' Bank of Philadelphia* v. *Bank of New-Brunswick*, 437

22. This practice has been generally acted on in this state; it is beneficial, and might safely be pursued in all ordinary cases. But there has been no actual recognition of the rule, except in cases where a draft of the account was served, and the party omitted to make any exceptions or suggest any alterations to the master. ib.

23. In a proceeding under a new statute, a party who is honestly seeking his rights should not be cut off by a mere technical rule. ib.

24. In a proceeding under the act to prevent frauds by incorporated companies, the complainants and all the applying creditors constitute one party. The receivers are their common agents, and the solicitor on record of the complainants is their common solicitor, and regularly all orders and proceedings should be in his name. ib.

25. It is irregular for any one of the creditors to appear or act by his own solicitor, without leave of the court for that purpose first obtained. ib.

26. If any one of the creditors is so situated as to render it necessary that he should be represented separately before the court, application for that purpose should be made; and if substantial reasons are assigned to the satisfaction of the court, the application will be granted. ib.

V. Opening Decree.

27. A final decree will not be opened, on the application of the defendant, five and a half years after the decree was made, and four and a half years after it came to the knowledge of the defendant, upon the ground of the pecuniary inability of the defendant to make the application at an earlier day. *Robertson* v. *Miller*, 451

28. Applications to open decrees address themselves to the sound discretion of the court. They should be listened to, generally, with great caution, and should not be granted when the result must be injurious to the complainant. *ib.*

PROBATE. Vide EXECUTORS AND ADMINISTRATORS, 25—31. WILL, I.

PROMISSORY NOTE.

Promissory notes given in satisfaction of a personal injury inflicted on the payee, though they exceed the probable amount of the injury inflicted, have a sufficient consideration to support them in law, and will not be set aside unless a compromise of the public offence was included as a part of the consideration. *Whitenack* v. *Ten Eyck*, 249

PURCHASER. Vide VENDOR AND PURCHASER.

R.

RECEIVERS.

1. A claim which cannot be allowed as a set-off under the act to enable mutual dealers to discount, may be allowed as a set-off by receivers, under the act to prevent frauds by incorporated companies. *State Bank* v. *Receivers of the Bank of New-Brunswick*, 266

2. The property in the hands of receivers is considered as in court and under its control, to be administered so as best to subserve the purposes of equity. *ib.*

3. As soon as the assets are withdrawn from the debtor and placed in the hands of receivers, the general creditors acquire rights, which the court will protect by placing all the creditors on an equality as far as possible. *ib.*

4. It would be a delicate matter for the court, under any circumstances, to direct the receivers, appointed under the act, entitled, "An act to prevent frauds by incorporated companies," to compromise a claim, when in their opinion there could be no demand against them to affect assets in their hands; and it would be much more delicate, in a case where the court has decided that the contract was void and could not be enforced. *Suydam* v. *Receivers of the Bank of New-Brunswick*, 276

Vide PRACTICE, IV. MORTGAGE, 7, 8.

REFORMED DUTCH CHURCH. Vide CORPORATIONS, 11, 12.

RELIGIOUS SOCIETY. Vide CORPORATIONS, 11—16.

REVIEW, BILL OF. Vide PLEADING, II. PRACTICE, I.

S.

SET-OFF. Vide FRAUD, 5, 7. MORTGAGE, 16.

SHERIFF'S SALE.

1. The mere purchase of property at sheriff's sale for a nominal consideration, raises no equity, unless coupled with fraud. *Outcalt* v. *Disborough*, 214
2. Mere inadequacy of price, in the absence of fraud and collusion, is not sufficient ground to set aside a sheriff's sale and conveyance. *Mercereau* v. *Prest*, 460
3. If a purchaser at a sheriff's sale of mortgaged premises, sold by virtue of a decree for the satisfaction of the mortgage debt, purchase as agent for and at the request of the complainant, and take a deed in his own name, without paying any part of the purchase money, a resulting trust is raised in favor of the complainant. *Depeyster* v. *Gould*, 474

SPECIFIC PERFORMANCE. Vide AGREEMENT.

SUPPLEMENTAL BILL. Vide PLEADING, II. PRACTICE, I.

T.

TESTAMENTARY CAPACITY.

1. There is no distinction in the degree of mental capacity requisite for the execution of a will of real estate, and that requisite for the execution of a will of personal estate. *Sloan* v. *Maxwell*, 563
2. To constitute a sound and disposing mind and memory, it is not essential that the mind should be unbroken, unimpaired, unshattered by disease or otherwise. The charge of chief justice Kirkpatrick, in *Den* v. *Johnson*, 2 *South.* 454, commented on. *ib.*
3. The standard of testamentary capacity laid down by judge Washington, in *Harrison* v. *Rowan*, 3 *Wash. C. C. R.* 580, and in *Den* v. *Vancleve*, 4 *Wash. C. C. R.* 262, approved and adopted. *ib.*
4. It is not necessary that a man should be possessed of a mind naturally strong, or that the powers of his mind or memory should be wholly unimpaired, to enable him to make a valid will. *Andress* v. *Weller*, 604
5. The opinion of Washington, justice, in the case of *Den* v. *Vancleve*, 4 *Wash.* 262, approved and adopted as prescribing the true standard of testamentary capacity. *ib.*
6. When the testator's habits of intoxication are not such as to render

him habitually incompetent for the transaction of business, it is necessary for the party setting up the incapacity of the testator on the ground of casual intoxication, to show its existence at the time of executing the will. *ib.*

7. If previous general insanity or incapacity be established, the burden of showing capacity at the time of executing the will, rests upon the person offering it for probate. *Goble* v. *Grant*, 629

8. Though the omission by a testator to make any provision for a part of his children, will not of itself suffice to establish incapacity, yet such an omission not satisfactorily accounted for, is entitled to great consideration when there is any evidence of a fraudulent procurement of the will, or when the will is made by the testator *in extremis* in favor of those around him. *ib.*

TRUST AND TRUSTEE.

1. There is no particular formality necessary to the acceptance of a trust. If a person actually consent, or if he go to the property and exercise any power or right over it, it may be considered an acceptance, and especially when the rights of third persons are interested. *Scull* v. *Reeves*, 84

2. It is not necessary that there should be an actual consent either in writing or by parol; acts fairly implying a consent are sufficient. *ib.*

3. A resulting trust may be established by parol. *Hutchinson* v. *Tindall*, 357

4. But a trust coming within the provisions of the statute of frauds, can never be established by parol, especially where there is no mistake or omission alleged in preparing the instrument. *ib.*

5. A declaration of trust requires no formality, so that it be in writing and have sufficient certainty to be ascertained and executed; and it is not material whether the writing be made as evidence of the trust or not. *ib.*

6. The testator by his will gives personal and real estate in trust to provide a home or residence for his daughters, the survivor or survivors of them, so long as they remain single and unmarried. *Held*, that the trustee was bound to provide one home or residence for all the daughters, and not a home or residence for each one separately. *Oliver* v. *Oliver*, 368

7. If the trustee, by her misconduct, deprives the cestui que trust of the free enjoyment of the trust fund in the mode pointed out by the testator, equity may direct that she shall enjoy it in a different mode. *ib.*

8. But this court will not interfere with the appropriation of the trust fund so as to direct it differently from the intention of the testator, except in a very clear case. *ib.*

9. A mere difference of opinion among the cestui que trusts, or an indisposition to live under the same roof, will not be sufficient. *ib.*

10. An amicable adjustment of a family controversy recommended, and the opinion of the court withheld to afford an opportunity for that purpose. *ib.*

Vide ASSIGNMENT AND ASSIGNEE, 1—10. SHERIFF'S SALE, 3. WILL, 13.

V.

VENDOR AND PURCHASER.

1. A party who purchases from one not in possession of the bargained premises, cannot claim to be a bona fide purchaser without notice; for possession in another is notice sufficient to put the party on inquiry. *Diehl* v. *Page*, 143
2. A decree for the specific performance of a contract will not be refused on the ground that the purchaser was intoxicated at the time of the sale, unless it appear that such intoxication was produced or procured by the vendor, or that an undue advantage had been taken of the situation of the purchaser. *Pittenger's Adm'r* v. *Pittenger*, 156
3. If the vendor is ready at the time appointed to perform his part of the contract, and offers to do it, it is sufficient. *ib.*
4. If a deed is to be given, and the vendor is present prepared to sign it, and the one who is to receive it positively declines, there is no need of a formal execution and tender. *ib.*
5. The vendor of real estate has a lien in equity upon the estate sold, for the purchase money. *Van Doren* v. *Todd*, 397
6. The lien exists without any special agreement for that purpose, and it remains with the purchaser to show that from the circumstances of the case it results that the lien was not intended to be reserved. *ib.*
7. The fact that the period of payment is dependent on the life of another person, will not affect the lien. *ib.*
8. Nor will the lien be affected by the vendee giving his bond with security, where the security does not appear to have been given in pursuance of the contract, but upon the voluntary offer of the vendee. *ib.*
9. That the purchaser was a man of property when he made the purchase, will not defeat the lien. *ib.*
10. The lien will be enforced against the vendee and all persons claiming under him with notice of the equity. *ib.*
11. So persons holding the bargained premises under an assignment made by an insolvent debtor, or by virtue of a conveyance from the assignee, will hold subject to the lien, though without notice of the incumbrance. *ib.*
12. Persons taking under an assignment by operation of law, are not considered purchasers for a valuable consideration, in the proper sense of the words. *ib.*
13. No person is entitled to the protection afforded to a bona fide purchaser for a valuable consideration without notice, without having made actual payment of the purchase money. *ib.*

Vide MORTGAGE, 18—20.

W.

WASTE.

Where a farm has been purchased and is occupied for mining purposes, any necessary or proper use of the property in mining operations is not waste. *Capner* v. *Flemington Mining Co.* 467

Vide INJUNCTION, II.

WATER COURSE.

1. Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminution or alteration. *Shreve* v. *Voorhees*, 25
2. He has no right to use the water to the prejudice of other proprietors above or below him. He may use it while it runs over his land, but cannot unreasonably detain it, or give it another direction. *ib.*
3. An exclusive enjoyment of water or of light, or of any other easement, in any particular way, for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person, which might have been, but was not asserted. *ib.*
4. A trivial or unimportant interference, such an one as does not sensibly and plainly interrupt the complainant's enjoyment, will not call for or warrant the restraining power of a court of equity. *ib.*
5. As against a riparian owner seeking to erect an improvement on his own land, the complainant ought to show that his superior rights have been or will be, not probably, but really and sensibly affected. *ib.*
6. If the complainant is secured in the enjoyment of the use of the stream as he has heretofore had it, without any sensible and material alteration so as to occasion an actual injury, it is all he can require. *ib.*

Vide INJUNCTION, 21.

WILL.

I. Execution, Revocation, and Probate of.

II. Construction of.

I. Execution, Revocation, and Probate of.

1. In ordinary cases, where a testator is in health and of ability, it is not necessary to show that the will was read over to him, or that he knew the contents of it. The legal presumption in such cases is always in favor of the will; and he who seeks to impeach it must show conclusively that the testator was imposed on, or that there was some mistake whereby he was deceived. *Day* v. *Day*, 549
2. But where it appears affirmatively that the testator did not read the will himself, and that it was not read to him, it must then be shown to the satisfaction of the court that he was in some other way made acquainted with the contents of the instrument and approved them. *ib.*

3. So if the testator be incapable of reading the will, whether the incapacity arise from blindness, sickness, or any other cause, the rule is the same, and the burden of proof is thrown on the person offering the will. *ib.*

4. If it be established either by direct evidence, or by circumstances so conclusive as to admit of no reasonable doubt, that the will in question was truly copied from a previous will, with the contents of which the testator was acquainted, the instrument will be admitted to probate although it was neither read by him nor in his hearing. *ib.*

5. Or if it can be shown that the will in question is substantially in accordance with the instructions of the testator, it may be considered as sufficient evidence that he was acquainted with its contents. *ib.*

6. If a prior will be revoked by a subsequent one, and both be improperly destroyed, the contents of the first instrument cannot be established as the testator's will, although the contents of the second will cannot be ascertained. *ib.*

7. The act, entitled, "An act relative to the probate of wills," passed March 6th, 1828, (*Harrison*, 195,) has no reference to a will executed in this state, by one who at the execution of the will, and at the time of his death, lived in this state. The act has reference to foreign wills only. *Wallace* v. *Wallace*, 616

8. To constitute a valid will of real estate under the statute of New-Jersey, the testator must sign the will in the presence of the subscribing witnesses. A mere acknowledgment of his signature is insufficient. *Combs* v. *Jolly*, 625

9. To support an instrument as a will of personal estate, it must be shown that it was intended and understood to be a will, and executed as a will. *ib.*

Vide EVIDENCE, 8—12. TESTAMENTARY CAPACITY.

II. Construction of.

10. A testator by his will gave to his son Enoch one thousand dollars, to be paid at the death of the testator; to his daughter Eliza one thousand dollars, to be paid at the age of twenty-one; and to his daughter Catharine fifteen hundred dollars, also to be paid at the age of twenty-one; and added, "if any of my before named children should decease before he or she shall attain the age of twenty-one years, without lawful issue him or her surviving, then his or her said legacy shall lapse and form a part of the residue of my estate, to be distributed among my surviving children as herein after mentioned." He then gave to his daughter Euphemia seven hundred dollars, in addition to three hundred dollars he had previously given her. The will then contains the following clauses: "As to all the rest and residue of my estate, I give and bequeath the same unto my said son Enoch, and my said daughters Eliza and Catharine, in equal

shares to be divided among them; but in case my said daughters, or either of them, (who are now minors,) shall decease before they attain the age of twenty-one years, without lawful issue them surviving, the part of her or them so deceased shall lapse into the general fund of my estate, to be divided as aforesaid among the survivors of them. And my further will is, that although I have heretofore given and advanced to my oldest son George, the sum of twenty-five hundred dollars, which I suppose is at least as much if not more than will come to my other children under this my will, yet, nevertheless, if it shall so happen by the lapse of any legacies or legacy herein before mentioned or intended to be given as aforesaid, or from other causes so augmenting the residue of my estate that there shall be a surplus after distributing to my other children in manner aforesaid, so much as shall make their respective shares, taken with their aforesaid legacies, respectively, amount to the sum of twenty-five hundred dollars, then my son George shall come in for a share with my other children." After the death of the testator, Catharine, one of his daughters, died under the age of twenty one, and without lawful issue her surviving. *Held*,

(1.) That Euphemia is not entitled to an equal share of the residue with Enoch, Eliza and Catharine.

(2.) That she is not entitled to an equal share with Enoch and Eliza, of the legacy of Catharine, which by her death fell into the residue.

(3.) That she is not entitled to an equal share with Enoch and Eliza, of Catharine's share of the residue, which by her decease fell into the estate. *Hillyer* v. *Dunn's Ex'r*, 390

11. A testator by his will gave and bequeathed to his wife his real estate, and so much of his personal as she might choose to take, to be held and enjoyed by her during her natural life. He then ordered, that after the death of his wife, his personal and real property should be sold and divided, two thirds to his own relations, and one third to his wife's relations; "that is to say, the two thirds shall be divided, share and share alike, between the heirs of J. S., W. S. and his heirs, and P. S. and his heirs; and the one third shall be divided between A. M. and his heirs, and M. the wife of J. M. and her heirs." The division was ordered to be made by his executors within a reasonable time after his wife's death, not to exceed three years. *Held*,

(1.) That the legacies over after the death of the testator's wife, vested on the death of the testator.

(2.) That the heirs of J. S. (who was dead) should represent their father and take one share among them, and that W. S. and P. S. should each take one share absolutely, and not equally with his children. *Wintermute's Ex'rs* v. *Snyder's Ex'rs*, 469

12. A legacy to A. and his heirs, is an absolute bequest to A. *ib.*

13. Where a testator bequeathed to trustees a legacy for the benefit of an unmarried daughter, with directions, that if she should be desirous

to have the money laid out in the purchase of real estate for her use and convenience, whether married or otherwise, the trustees should take the title for any property so purchased, in the name of such daughter only. *Held*, that the trustees were bound to lay out the money in the purchase of real estate, and to take the title in the name of the daughter, whenever she should desire it, although her husband (she having married) would thereby acquire an interest in the lands which might be charged with his debts. *Vernon* v. *Marsh's Ex'rs*, 502

14. The intention of the testator is to be taken from the will itself, and not from conversations which took place at the time it was prepared. 41.

Vide GUARDIAN AND WARD, 4. LEGACY. TRUST AND TRUSTEE, 6.

WITNESS. Vide EVIDENCE, 5, 8, 9.